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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-679

CHARLES WOLFF, JR., etc., *et al.*,

Petitioners,

v.

ROBERT O. McDONNELL, etc.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The citation of the opinions below is adequately set forth in the Brief of Petitioner at 1. The opinions below may also be found at the Petition for Writ of Certiorari, Appendix-1, -2, and -3, APP-1 through 47.

JURISDICTION

The grounds on which the jurisdiction of this Court is involved are adequately set forth in the Brief of the Petitioners at 1-2.

QUESTIONS PRESENTED

Whether the inmates of the Nebraska Penal and Correctional Complex (the Complex) are entitled to minimum due process when faced with the possibility of suffering "grievous loss" at the hands of the Complex Adjustment Committee in prison disciplinary hearings and, if so, what is minimum due process; whether constitutional standards appropriate to prison disciplinary hearings should be restricted to solely prospective application; whether the Complex regulations for handling inmate-attorney mail meet constitutional standards; and whether the inmate legal assistance program of the Complex meets constitutional standards.

STATUTES INVOLVED

The constitutional and statutory provisions set forth in the Brief of the Petitioners at 2-6, and in addition:

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Also Act of June 25, 1948 c. 646, 62 Stat. 964; Act of May 24, 1949 c. 139, §111, 63 Stat. 105; Act of August 28, 1954, c. 1033, 68 Stat. 890; Act of July 7, 1958,

Pub. L. No. 85-508, §12(p), 72 Stat. 349; 28 United States Code:

§2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested parties seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

And Act of June 25, 1948, c. 646, 62 Stat. 964; 28 United States Code:

§2202.

For the necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

And Federal Rules of Civil Procedure:

Rule 57

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. §2201, shall be in accordance with these rules and the right to trial by jury may be demanded under the circumstances and in the manner provided in rules 38 and 39. Existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The Court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

And Nebraska Treatment and Corrections Act §7, as amended by LB57, Session Laws 1973, §1, NEB. REV. STAT. §83-176 (1973 Supp.)

Whenever any person is sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services or to the custody of the warden or superintendent of such facility, he shall be deemed to be sentenced or committed to the department.

(2) The Director of Correctional Services may designate as a place of confinement of a person committed to the department any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another subject to the following:

(a) A minor declared neglected, dependent, or in need of special supervision pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the State Reformatory for Women, or any other facility designed primarily for the imprisonment of adult offenders.

(b) A minor declared delinquent pursuant to the provisions of Chapter 43, article 2, shall not be assigned or transferred to the Nebraska Penal and Correctional Complex, the State Reformatory for Women or any other facility designed primarily for the imprisonment of adult offenders, unless he is sixteen years of age, or older, and he is a serious threat to the safety of persons in other facilities. The determination as to whether the minor is a serious threat to safety shall be made only after juvenile court hearing in the court of original disposition, at which the minor shall have the right to be represented by counsel.

And Nebraska Treatment and Corrections Act §16, as amended by LB499, Session Laws 1972, §1, NEB. REV. STAT. §83-185 (1972 Cum. Supp.):

(1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Division of Corrections who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

(2) Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83-1,107 be forfeited or withheld and also that the person be confined in a disciplinary cell. The chief executive officer may order that such person, during all or part of the period in a disciplinary cell, be put on an adequate and healthful diet. A person in a disciplinary cell shall be visited at least once every eight hours. No cruel, inhuman or corporal punishment shall be used on any person.

(3) The chief executive officer shall maintain a record of breaches of discipline, of the disposition of each case, and of the punishment, if any, for each such breach. Each breach of discipline shall be entered in the person's file, together with the disposition or punishment therefor.

(4) The chief executive officer may recommend to the Director of Corrections that a person who is considered to be incorrigible by reason of frequent intentional breaches of discipline, or who is detrimental to the discipline or the morale of the facility, be transferred to another facility for stricter safekeeping and closer confinement, subject to the provisions of section 83-176.

And Nebraska Treatment and Corrections Act §38, NEB. REV. STAT. §83-1,107 (1971 Reissue):

(1) The chief executive officer of a facility shall reduce for good behavior and faithful performance of duties while confined in a facility the term of a committed offender sentenced as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

(a) From his minimum term, to determine the date of his eligibility for release on parole; and

(b) From his maximum term, to determine the date when his release under supervision becomes mandatory under the provisions of section 83-1,111.

(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. No reduction of an offender's term shall be forfeited or withheld after an offender is released on parole.

STATEMENT

Robert McDonnell filed this action in the United States District Court for the District of Nebraska in July, 1970, against the chief executive officer, Warden Maurice Sigler, and other prison officers of the Nebraska Penal

and Correctional Complex on behalf of himself and other inmates in the Complex.*

The action challenged several of the practices, rules and regulations of the Complex, however, many such challenges were settled by stipulation of the parties prior to trial with appropriate order at trial.

In trial attention was focused basically upon three general areas: (1) disciplinary hearings at the Complex; (2) inmate legal assistance; and (3) inmate mail, with specific emphasis on attorney-inmate correspondence. Whether or not reprisals were practiced against prisoners exercising the rights to petition the Courts for redress of grievance was also tried.

The trial court granted relief to the inmate class on several of the complaints, particularly with regard to substantive due process, handling of inmate-attorney mail, rules affecting the use of the legal library at the Complex, and on several ancillary matters. The District

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*In Nebraska all persons sentenced or committed under any provision of law to a specific facility within the Department of Correctional Services, or to the custody of the Warden or Superintendent of any such facility, is deemed to be sentenced or committed to the department. The Complex is one of a number of institutions in the department which is itself under the control of the Director of Correctional Services. The department has "oversight and general control" of all penal institutions. Nebraska Treatment and Corrections Act §7, as amended by LB57 §1, Session Laws 1973, §83-176 NEB. REV. STAT. (1973 Supp.).

The practices, rules and regulations of the Complex attacked in this proceeding all are in force only at that institution and are drafted by the Warden of that facility and not by the Director of the department. *See, Board of Regents v. New Left Education Project,* 404 U.S. 541, 542-43 (1972), *cf., Sands v. Wainwright, etc.* No. 73-1192 (5th Cir. Dec. 26, 1973) *pet. for cert. filed, Guajardo v. Estelle* and *Guajardo v. McAdams,* Misc. No. 73-6465,

Court, at that time bound by *Morrissey v. Brewer*, 443 F.2d 942 (8th Cir. 1971), indicated that it could not follow its inclination to follow the lead of cases such as *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971), in requiring that minimum due process be afforded prisoners in disciplinary hearings.

The State of Nebraska appealed, and plaintiff McDonnell cross-appealed to the Eighth Circuit Court of Appeals which granted further relief by reversing such portions of the District Court's order as did not require that the Complex afford minimum due process to inmates when brought before the Complex Adjustment Committee for disciplinary reasons. The Court of Appeals remanded the case to the District Court of Nebraska for further hearings on the due process and legal assistance questions. Particularly, with regard to due process at disciplinary hearings, the District Court directed that further attention be paid to when "fundamental fairness" might require counsel at hearings under this Court's teachings in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The Court also found that while it could not *restore* good time until such time as state remedies had been exhausted, it could and did order that the existing procedures utilized by the Complex in disciplinary hearings did not provide minimum due process to prisoners accused of violating prison rules of conduct for which *substantial penalties* could be imposed if guilty. The Court of Appeals also indicated what requirements seemed to provide minimum due process:

> (a) notice of the charges in time to prepare defense;
>
> (b) an opportunity to summon, confront or cross-examine witnesses;
>
> (c) legal assistance in the preparation of a defense; or

(d) a written statement by the fact finders as to the evidence relied on and reasons for the action taken.

On re-hearing the Court of Appeals expressly denied that its order required "the State to provide or permit legal counsel to every state prisoner involved in a prison disciplinary hearing which may result in a serious penalty. Rather, we follow *John R. Gagnon, Warden v. Gerald H. Scarpelli*, No. 71-1225 (41 LB 4647, May 14, 1973), in holding that counsel was required only in those cases where fundamental fairness cannot be achieved absent counsel." *McDonnell v. Wolff*, 483 F.2d 1059, 1067 (8th Cir. 1973).

The Court of Appeals affirmed the District Court's order relating to mailing regulations.

The Court of Appeals also found that the inmate legal assistance program at the Complex did not pass constitutional muster under *Johnson v. Avery*, 393 U.S. 483 (1969), and remanded the case to the District Court for further hearings to develop what the exact *need* for the legal assistance was, and whether such need was being met. The District Court was ordered to consider civil rights actions in determining the needs of the prison inmates for legal assistance.

SUMMARY OF ARGUMENT

The loss of good time, conferred by statute for "good behavior and faithful performance of duties," and the conditions of a prisoner's incarceration (as opposed to the mere fact of his incarceration) are both matters in which society and the incarcerated offender have a great and substantial interest. For the penal administration to require forfeiture of accumulated good time sentence

credit, to prevent the accumulation of additional good time credit, or alter the status of a prisoner's confinement (to such of an appreciably more severe nature) are, all, to cause a person to suffer "grievous loss." This Court's teachings are that this action can only be accomplished by first affording the person affected the protection of minimum due process.

To afford a prisoner minimum due process in the above situations requires that a prison's designated authority for imposing discipline adopt meaningful hearing procedures which, when they comport with minimum due process standards, are geared to produce reliable and trustworthy findings of fact upon which "informed" correctional expertise may act. A meaningful hearing in a prison environment must include the following factors and attributes:

(1) Notice

(a) specific and sufficiently detailed description of the conduct complained of by the penal authorities to allow understanding of the charge;

(b) time and place such charge will be heard;

(c) a reasonable opportunity to prepare;

(2) Confrontation and Cross-Examination

(a) appropriate for the circumstances and nature of the charge and for legitimate security interests as established;

(3) Presentation of Testimony

(a) appropriate opportunity to call witnesses or present documentary evidence in one's own behalf;

(4) Assistance

Assistance in preparation and presentation of facts or defense as available from prison resources (staff members, other inmates, other personnel) or, if fundamental fairness demands, by a lawyer;

(5) Reliable Findings

Written findings of fact based upon the evidence adduced at the hearing.

When, in those rare instances. fundamental fairness requires counsel, it must and should be furnished by the State to the accused offender within the prison. It is indeed difficult without the benefit of the further findings of fact, as required by the Court of Appeals on remand, to postulate instances in which counsel may be necessary, however, some suggestions are respectfully made as stimulii for further thought, and as indications of the course which probably would be charted by the plaintiffs in the District Court.

The *purpose* served by giving full application of the Court of Appeals relief (on the expungement of prisoner's records) to the plaintiff inmate-class is of overriding benefit to both society and the prisoner. It should, however, be noted that as of yet no order of expungement has been entered for any prisoner in the Nebraska Complex. Again, further fact-finding is necessary in the District Court. Assuming, however, *arguendo*, that expungement should be found to be the proper remedy for individual members of the plaintiff class, the effect of such will not be to allow any prisoner accelerated discharge, parole, or conditional release, unless and until, further action is initiated by the individual to have unlawfully forfeited good time credit restored to him. This has always been the posture of this action, which seeks declaratory and injunctive relief against the prison administration at the Complex.

An inmate's legal mail is, as all parties concede, a valued interest which cannot be abridged, or otherwise restricted, except in the face of substantial and overriding State interest. Convenience or simplicity are not sub-

stantial enough State interests, especially when close examination reveals that the arguments of inconvenience and complexity are, in fact, illusory. Lastly, a person is protected by the Due Process Clause in his efforts to petition Courts for redress of grievance. The Court has set the standards touching the exercise of this right by prisoners long ago, and it is too late to argue that the full range of a prisoner's grievances are not adequately and effectively protected by the First Amendment.

ARGUMENT

I.

PERSONS MUST BE GIVEN A MEANINGFUL HEARING WHICH COMPORTS WITH MINIMAL DUE PROCESS STANDARDS WHEN ACCUSED OF VIOLATING PRISON RULES OF CONDUCT, THE PENALTY FOR WHICH CONDEMNES THE PERSON TO SUFFER GRIEVOUS LOSS.

A. Interest Involved

The threshold question for determining when procedural due process is required is whether an individual will be "condemned to suffer grievous loss" by state actions which do not further compelling state interests. If such a loss is present, then the Due Process Clause of the Fourteenth Amendment intervenes to protect the individual. *Goldberg v. Kelly*, 397 U.S. 254 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1973); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

The continual evolution of due process is, of course, not new to our society. *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 168.

This Court is not alone in recognizing that the right to be heard before being condemned to suffer

grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Under these principles consideration of "not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment" is also required. *Morrissey v. Brewer*, 408 U.S. at 481.

B. Nature Of The Interest

When a prisoner is charged with violating a prison rule of conduct in Nebraska the charge is investigated (A. 29-31) and if "unresolved" during investigation, is brought before the Adjustment Committee. (A. 31-32) According to the Warden "a small number, though, a very small percentage" (A. 32) actually come before the Adjustment Committee of the prison. The Committee is charged by the Warden with reviewing reports of misconduct, conducting hearings into such reports, making findings and imposing disciplinary actions (*See*, R. Vol. I, Stipulation of Fact, Ex. C (Filing 42) for the purposes of and procedures of the Adjustment Committee of the Nebraska prison; as noted at A. 4, the Exhibit is found at Petition for Writ of Certiorari, Appendix-2, at APP. 44-47.)

The thrust of the procedures utilized by the prison as of April 1, 1971, to impose discipline on the inmates evidences not only society's high regard for orderly process,[1] but also penologists' recognition of the need for fairness in dealing with their clients.

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[1] *Joint Anti-Fascist Refugee Committee v. McGrath, supra* at 170:

The defendants have conceded that fundamental due process is required when the prison takes disciplinary action which could result in a serious punishment.[2] This concession reflects nearly universal correctional practice. The National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) (hereinafter *Corrections*) recommends that, as a matter of fairness and good sense, hearings be afforded to prisoners charged with serious disciplinary violations. *See, Corrections,* Standard 2.12 at 51-2.

The ABA Resource Center on Correctional Law & Legal Services, *Survey of Prison Disciplinary Practices & Procedures,* at 9-11 (April 1973), (hereinafter ABA Resource Center Survey) Appendix A hereto, notes that fifty-one American jurisdictions afford prisoners disciplinary hearings. There can be little doubt that substantial individual interests are involved.

Those interests include the potential freedom of the inmate through loss of "good time," and the inmate's status within the prison.

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; * * *

[2] *McDonnell v. Wolff, supra* at 1062 (8th Cir. 1973): "In view of the developments in the law, subsequent to trial, the defendants no longer contend that inmates are not entitled to minimum due process in disciplinary hearings which may result in the loss of good time, or the imposition of other substantial penalties. Instead, they argued that existing procedures provide such due process." *See also,* Brief of Evelle J. Younger, Attorney General of the State of California, *Amicus Curiae,* 4 & n. 1.

Contrary to defendant's assertion that good time has been "ruled out of this civil rights case by the court below," Brief for Petitioners at 21, the loss of good time remains a salient and essential factor to be weighed in considering "grievous loss."

The Court of Appeals held that the District Court could not, under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), order *restoration* of good time in a civil rights action. However, the Eighth Circuit correctly noted that *Preiser* does not bar injunctive and declaratory relief for inmates challenging conditions of confinement,[3] nor does it bar consideration of good time deprivations for purposes of determining "grievous loss."[4]

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[3] *See,* McDonnell's Amended Complaint, prayer for relief 2, at 14, and prayer for relief 5, at 15, where declaratory and injunctive relief is sought.

[4] "It follows from *Preiser* that it would be improper for the District Court on remand to restore good time which may have been taken from inmates in proceedings that did not meet the requirements of procedural or substantive due process. A federal court can restore good time only if state remedies have been exhausted.

* * *

To summarize, the District Court must, on remand, determine what procedures are necessary to meet minimum procedural due process standards and whether they are being met. If the defendant is not meeting these standards, the court may grant such declaratory and injunctive relief as it deems necessary, except that it may not restore good time.

483 F.2d at 1064.

The Court of Appeals did not express an opinion as to the adequacy of Nebraska remedies in view of the *Preiser* decision, but instead left that issue to be determined by the District Court on remand. *McDonnel v. Wolff, supra* at 1064.

By holding, in *Preiser*, that loss of good time materially affects the length of a prisoner's sentence, this Court has itself recognized the substantial interests an inmate has in not losing such time in an arbitrary manner. The prisoner's ability to accumulate additional good time sentence credit is in part statutorily controlled and is directly related, in Nebraska, to the prisoner's "good behavior and faithful performance of duties while confined in a facility." Nebraska Treatment and Corrections Act §38, NEB. REV. STAT. §83-1, 107 (Reissue 1971).[5]

> The time when an inmate may enjoy liberty is directly affected by the disallowance of statutory good time. In Green's case, for example, the discipline administered by the prison authorities will postpone the time of release for at least 21 months. Cancellation of such credits inflicts the same kind of "grievous loss" on the prisoner as does the revocation of parole. *United States ex rel. Miller v. Twomey*, 479 F.2d 801, 815 815 (7th Cir. 1973). (Footnotes omitted).[6]

An inmate's status within the prison is equally important. It does not minimize the difference between being a "free person" and a "confined offender" to point out that no person enjoys absolute liberty. Society has

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[5] *See, McDonnell v. Wolff*, 342 F. Supp. 616, 640 & Appendix M (D. Neb. 1972), also set forth in Pet. for Cert., Appendix-2, at App. 39.

[6] The District Court found that Nebraska inmates lost substantial good time: Inmate Jackson lost 70 days; Inmate Owen, 95 days; Inmate Rogers, 45 days; and Inmate Montgomery had "to wait an additional six months for parole," 342 F. Supp. 616, 626-7.

learned to live with constraint or regimentation in one form or another, be it from employment requirements, family responsibilities, societal mores or expectations of the law. Although a prisoner is without freedom of movement, he may enjoy all the "liberty" which his prison performance record permits or which the necessary rules of governing a confined body of person allows.[7]

The prisoner, as a member of the prison population, is "free to" move within that population and, assuming positive response to treatment, will progress toward rehabilitation, in most cases eventual release, (conditional or otherwise) and, hopefully, reintegration into society at large. The prisoner's role as a member of the general prison population parallels his ex-role as a member of general society.

As *Morrissey v. Brewer*, 408 U.S. 471 (1972) recognizes, a parolee has a valuable property interest in achieving and maintaining even his conditional liberty in society, even though he may be subjected to many restrictions not applicable to other citizens. "Liberty", then, is not an absolute, nor limited solely to freedom of movement, but rather is a thing composed of several component parts, the sum total of any number of which (or the very nature of any particular type of which) is valuable to the holder and, as such, is within the "liberty

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[7]Indeed, Mr. Justice Blackman, while sitting on the United States Court of Appeals for the Eighth Circuit, wrote:

> On the other hand, a prisoner of the state does not lose all of his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors. *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1958) (Citations omitted).

or property" language of the Fourteenth Amendment.[8] And, just as in society, there are restrictions and punishments, other than the fact of incarceration, which can seriously and adversely affect a prisoner's status in the prison, the nature of his confinement, and his access to prison programs.

1. *Solitary Confinement*

When appearing before a disciplinary hearing the prisoner may have at stake being placed in additional or more severe confinement than that to which he has been sentenced by being delivered to the Nebraska Department of Correctional Services.[9]

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[8] That "liberty" is not so narrow a concept as the defendants urge has been made pellucid by this Court numerous times. Thus, loss of one's ability to purchase liquor, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), or of one's driver's license, *Bell v. Burson*, 402 U.S. 535 (1972), have been held sufficient to justify procedural due process. The Seventh Circuit said, in *United States ex rel. Miller v. Twomey*, *supra* at 712:

> In view of the fact that physical confinement is merely one species of legal custody, we are persuaded that *Morrissey* actually pretends a more basic conceptual holding: liberty protected by the due process clause may—indeed must to some extent—coexist within legal custody pursuant to conviction. The deprivation of liberty following the adjudication of guilt is partial, not total. A residuum of constitutionally protected rights remains. (Citations omitted).

[9] *See*, Nebraska Treatment and Corrections Act §7, as amended by LB57, Session Laws 1973, §1, NEB. REV. STAT. §83-176 (1973 Supp.) and Nebraska Treatment and Corrections Act §16, as amended by LB499, Session Laws 1972, §1, NEB. REV. STAT. §83-185 (1972 Cum. Supp.), as set forth at 342 F. Supp. at 639 & Appendix L.

An inmate may be sent to solitary confinement for as long "as necessary." 342 F. Supp. at 648. (Nebraska calls such a confinement "segregation" in the "Adjustment Center.") Here every aspect of the prisoner's life within the prison is altered.

The prisoner is placed on a restricted diet when placed in the Adjustment Center; by definition the prisoner receives no visitors, sees no other prisoners or other persons, participates in no prison programs and has restrictions placed on the availability of legal assistance and correspondence.[10] A prisoner in segregation is likewise unable to earn good time credits.

This Court, in the last century, recognized that solitary confinement is "an additional punishment of the most important and painful character * * *," *In re Medley*, 134 U.S. 160, 167-70, 171 (1908).

The psychological impact upon the entire rehabilitation process cannot be disregarded: "Maximum prison lockup without an appropriate activity program is detrimental to the inmate's health and his rehabilitation prognosis." Scott and Gendeau, *Psychiatric Limitations on Century Deprivations in a Maximum Security Prison*, 14 CANADIAN PSYCHIATRIC ASSOCIATION JOURNAL, 330-341, (1969).

The Nebraska prison administration recognizes the nature of such confinement: Special reports are prepared on men in solitary, and before such punishment may be imposed the inmate must have violated one or more important prison rules.

Perhaps any one of the incidents of solitary; (a) the substantial curtailment of all activities, (b) the drastic

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[10] *See*, A. 30; 342 F. Supp. at 622, 626-27, 633 and Appendix H, 639 and Appendix L, and 647-48 and Appendix Q.

change in a prisoner's position with regard to the general prison society, or (c) the serious detriments solitary may have upon the mental health and rehabilitation, may not by themselves appear particularly egregious, but certainly when taken together, their total impact demonstrate that a prisoner has a "valuable interest" in not being arbitrarily placed in solitary confinement.

2. *Parole And Classification*

As the Court of Appeals noted, one of the most damaging aspects of being arbitrarily found guilty of misconduct is that the report of such disciplinary actions becomes a part of a prisoner's permanent record.[11]

Penology experts give this factor considerable weight:

> The deterrent values of punitive segregation lie not only in amount of time served, . . . but also in the influence upon the actions of the paroling authorities . . . such disposition . . . may effect an inmate's calendar status or may result in revoking of a parole hearing date.

American Correctional Association; *Manual of Correctional Standards*, 413 (3rd Ed. 1966).

As this Court recognized in *Morrissey v. Brewer, supra* at 482: "The parolee has been released from prison based

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[11] " * * * [It] may follow him throughout the prison system; if his punishment was without cause, he is punished anew each time his record is used against him. * * * Similarly, his disciplinary record may affect his eligibility for parole. * * * *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970) (Citations and footnotes omitted).

See, McDonnell v. Wolff, supra at 1064 & n. 7.

on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person." This "reasonable evaluation" has been made from reviewing the record which the prisoner has compiled while in the custody of the prison. If such great weight is to be accorded these findings, the inmates have substantial interests in assuring their fairness and accuracy.

3. *Confinement To A "Dry Cell"*

A "dry cell" is a cell which, unlike the regular confinement cells, contains no sink or toilet.[12]

A prisoner so confined is without water to wash or to drink, and has no toilet for elimination of bodily wastes.[13] Since the prison regulations require that inmates shower twice a week, and daily showers are encouraged,[14] the prison obviously recognizes the importance of personal hygiene. Such confinement can last indefinitely. There are simply no persuasive arguments that confinement under such conditions for a substantial period of time does not present substantial individual interests.

Additionally, prison inmates have substantial interests in their own treatment and rehabilitation. When treated fairly and punished only after a meaningful opportunity to be heard, their chances for successful rehabilitation

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[12]342 F. Supp. at 626.

[13]Deprivation of such basic requirements of life has been held to constitute cruel and unusual punishment, *Jordon v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

[14]342 F. Supp. at 642.

and return to society may be greatly enhanced. *Morrissey v. Brewer, supra* at 483-84 & n. 12. *See also, Corrections,* Standard 2.12, 51-53.

Therefore, while the defendants have attempted to distinguish the process due a prisoner when his good time credits are to be forfeited—all concede a "grievous loss"—from the process due a prisoner when "other substantial penalties" are imposed upon him; the distinction is meaningless from both a practical and a constitutional standpoint.

C. Governmental Interest

As was clearly stated in *Morrissey v. Brewer, supra,* the State's interest is, to a very large extent, coincident with and identical to that of the prisoners.

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given a breach of parole conditions. * * * Since society has a further interest in treating the parolee with basic fairness, fair treatment and parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.

408 U.S. at 483-84 & n. 12.

Of course, the State also has a very legitimate interest in the daily efficient and safe functioning of the prison through control of the prison population. The nature of the prison population is often such that summary treatment may be necessary to control a large group of potentially disruptive prisoners in close custody. *Morrissey v. Brewer, supra* at 483.

The daily administrative functioning of a prison, a legitimate state interest, must allow summary discipline for rule violations [redacted] in penalties of a non-substantial nature. In a prison situation this perhaps involves restrictions of entertainment privileges, commissary privileges, perhaps even, for a brief period of time, more severe confinement, such as to a solitary cell.

Of course, the prison must always retain the right to respond to compelling emergency situations,[15] as well as the power to take summary action against any individual who poses an immediate and present danger to either himself, other prisoners, staff, or society in general.[16]

Given the above factors, it must be recognized that the state has no interest in summarily imposing substantial penalties upon prisoners without procedural guarantees in non-emergency situations. *Morrissey v. Brewer, supra* at 484. As in *Morrissey*, what is needed is "an informal hearing structured to assure that the finding of a * * * [prison conduct] violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the * * * [prisoner's] behavior." 408 U.S. at 484. Bearing in mind that both the interest of the State and the prisoner will be furthered by a meaningful hearing, we turn to the nature of the process that is due.

D. The Requisites Of A Meaningful Hearing

As this Court has consistently reiterated: "The right to be heard before property is taken or rights or privileges

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[15] *See, e.g., Inmates of Attica Correctional Institution v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971).

[16] *See, e.g., Landman v. Royster*, 333 F. Supp. 621, 652 (E.D.V.A. 1971).

withdrawn, which have been legally awarded, is of the essence of due process." *Garfield v. Goldsby*, 211 U.S. 249, 262 (1908); *See also, Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This opportunity to be heard "must be 'at a meaningful time and in a meaningful manner,'" *Goldberg v. Kelly, supra* at 267, citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).[17]

The right to be heard in a meaningful manner does not, of course, create static and inflexible procedures which are universally applicable, rather,

> [t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. *Goldberg v. Kelly, supra* at 268-9.

This is simply "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer, supra* at 481.[18]

An individual receives a meaningful and ~~fast~~ fair hearing when reliable information is adduced, and the resulting decision is based upon information actually presented at the hearing. The thrust of this Court's prior decisions has been to provide measures which guarantee both the reliability of the information and the integrity of the decision. In *Goldberg v. Kelly, supra*, the Court held that

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[17] "... a state must afford to all individuals a *meaningful* opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (Emphasis added). *See also, Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

[18] *Morrissey* is itself illustrative of this flexibility. In *Morrissey* it was necessary to have a two-stage procedure, consisting of a preliminary hearing and a parole revocation hearing, 408 U.S. at 485-90, due to the nature of a parole revocation. Clearly a two-step process is not required here, as the incidents, as well as the material witnesses, are all normally conveniently located in the same area.

in order to assure that the information obtained is reliable a hearing should include:

> timely and adequate notice detailing the reasons for a proposed [action] and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. 397 U.S. at 267-8.

These same "minimum requirements of due process" which assure the reliability of information are now embodied in parole revocation procedures, *Morrissey v. Brewer, supra* at 488-9.

Thus, where informal hearings are necessary to assure that the determination being made has a basis in fact, these essentials of due process must be present so that any resulting exercise of discretion is "informed." Yet the District Court below found that Nebraska inmates appearing before the prison's "Adjustment Committee" were punished without prior notice, without an opportunity to confront their accusers or to call witnesses, and without an opportunity to tell their side of the story.[19] This need to assure appropriate safeguards is enhanced in prisons where traditionally broad rules[20]

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[19]342 F. Supp. 616, 626-7. For example, inmate Rice lost good time and spent five days in solitary confinement for refusing an order to work, but he was not able to produce witnesses nor confront his accuser, *Id.*, and it was subsequently revealed that he had, in fact, been in the prison hospital at the time of the offense. *See also*, Appendix C hereto.

[20]The rules of the Nebraska Penal Complex are found at 342 F. Supp. 616, 642-5. In Virginia a federal district court ruled that offenses such as "misbehavior", misconduct", or "agitation" did not sufficiently warn inmates as to what specific conduct was prescribed, *Landman v. Royster, supra* at 654-5. *See generally*, Fox, "Analysis of Prison Disciplinary Problems," in Vedder and Kay, *Penology*, 114 120. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972).

compound the possibility for discriminatory application.[21] The potential infirmities of the vague rules are muted by a hearing scheme which allows an inmate accused of violating a prison conduct rule an opportunity for the full airing of the circumstances of the alleged infraction.

Thus, an inmate facing a major disciplinary violation must be given specific and sufficiently detailed descriptions of the conduct complained of by the authorities to allow him to respond to the charges. This notice must also apprise the person as to the time and place that such charges will be heard, and must afford the individual a reasonable opportunity to prepare. *Cf. Morrissey v. Brewer, supra* at 486-7; *Groppi v. Leslie,* 404 U.S. 496 (1972).[22]

When an inmate has received notice and appears before a disciplinary body, he must be confronted by those with information adverse to him, and be afforded an opportunity to dispute that information, to assure its veracity and reliability, *Morrissey v. Brewer, supra* at 487; *Berger v. California,* 393 U.S. 314 (1969); *Pointer v. Texas,* 380 U.S. 400 (1965).

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[21]The New York State Special Commission on Attica, *Official* Report, 74-5 (1972) concluded that "in the absence of generally understood guidelines, corrections officials had great discretion in interpreting and enforcing the rules." *See,* A.39.

[22]Since in Nebraska under the April, 1971, rules, the corrections officer making the report must already prepare a written statement of the incident for the Adjustment Committee, A. 29, providing the inmate with a copy of that report would certainly not seem onerous. The ABA Resource Center Survey, *supra* at 11 (Appendix A) reports that 48 jurisdictions provide prior written notice to inmates.

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses, *Goldberg v. Kelly, supra* at 269.

The right to confront is so central to fairness that a criminal defendant's right to confrontation overrides society's interest in the confidentiality of juvenile court records, *Davis v. Alaska,* _____ U.S. _____ (1973), 42 U.S. L.W. 4295 (Feb. 26, 1974).[23]

The right to confrontation is, of course, not unlimited, and is subject to restriction where a clear risk of harm to the informant exists, *Cf. Morrissey v. Brewer, supra* at 487, or where the cross-examination goes beyond the scope of the hearing or becomes a "repetitive and unduly harrassing interrogation," *Davis v. Alaska, supra* at 4298.[24]

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[23]This Court has continually adhered to the importance of such confrontation as part of due process to assure accuracy and to prevent faulty memories, perjurers, or "persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy", *Greene v. McElroy,* 360 U.S. 474, 496 (1959). *See also,* Chambers v. Mississippi, 410 U.S. 284 (1973).

[24]The ABA Resource Center Survey, *supra* (Appendix A) puts to rest the myth that confrontation is particularly devastating in a correctional institution because it somehow diminishes authority. It appears that thirty-one jurisdictions presently allow confrontation in disciplinary hearings. *See generally,* Supplemental Brief and Appendix for Respondent, *Avant v. Clifford,* No. 22-73 (N.J. filed Feb. 8, 1974), at 37-45, Appendix B hereto. The nature and scope of the confrontation allowed varies from permitting inmates to cross-examine in every case, only in cases of "major" rule violations, or only in the discretion of the hearing officers. Other methods allow inmates' lay representatives, who may cross-examine. In some, inmates are allowed to submit written questions to be asked by the hearing officers. While Respondents certainly do not intend to endorse the more restrictive of these techniques as being sufficient to satisfy the requisites of a meaningful hearing, the point remains that the use of confrontation has not, in practice, resulted in deterioration of authorities' control of the institution. *See also,* Appendix A at 19.

The prisoner must also have the opportunity to present witnesses and information that would corroborate his own testimony, establish an alibi, and generally overcome the inherent suspicions concerning the veracity of an incarcerated person.[25] *Cf. Morrissey v. Brewer, supra* at 487-8.

Finally, the right to be heard in a meaningful manner at a prison disciplinary hearing, when "tailored to the capacities and circumstances of those who are to be heard", *Goldberg v. Kelly, supra* at 268-9, should include the opportunity to be assisted by a member of the prison staff, by a fellow inmate, or, in appropriate circumstances, by a lawyer.[26] Prison populations include a high number of uneducated, unsophisticated persons who may need such help to effectively and efficiently present evidence and assure reliable information, *Cf. Johnson v. Avery*, 393 U.S. 483, (1969), *Landman v. Royster, supra* at 654. The accused is also personally involved in the incident and perhaps unable to organize and marshall facts, or to argue in mitigation. Further, a prisoner accused of an offense may be unable to talk to potential witnesses or to gather documents in another wing of the institution. Staff personnel are assisting inmates in Maryland, *see, Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971), and Rhode Island, *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970).[27] This scheme may also allow

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[25]The ABA Resource Center Survey, *supra* at 11 (Appendix A) demonstrates that in twenty-five jurisdictions, inmates are permitted to present witnesses in their own behalf.

[26]Appropriate circumstances for representation by legal counsel will be discussed in Part II, *infra.*

[27]The ABA Resource Center Survey, *supra* at 11 (Appendix A) discloses that thirty-nine prison systems allow lay representation. Fourteen also allow representation by legal counsel.

the staff to perform cross-examinations, rather than the inmates themselves, alleviating authorities' fears of "elevating" inmates. This "law" representative can also assist in numerous ways in making the hearing process more administratively efficient as well as fairer.[28]

Notice, confrontation and presentation of witnesses, and lay assistance all go to insuring that the information before the factfinder is as reliable as possible. Due process also requires that this information be fully and fairly considered by the factfinder, *Goldberg v. Kelly, supra.*

While due process certainly does not dictate *who* the hearing officer must be, nor *how many* hearing officers must be present, it is clear that the factfinder cannot be someone who is involved in the incident as a witness, or as reporting officer or factual investigator, *Goldberg v. Kelly, supra* at 271, *Morrissey v. Brewer, supra* at 485-6. Such a requirement in no way impugns the motives of correctional officers; rather it realistically takes into account human nature and assures that the hearing is indeed "meaningful."

At the conclusion of the hearing, the factfinder should prepare "a written statement . . . as to the evidence relied on and the reasons for [the disciplinary action]", *Morrissey v. Brewer, supra* at 489. This memorandum will assure that the factfinder did not go outside the evidence presented at the hearing, although it clearly need not be a formalized opinion, *Cf., Goldberg v. Kelly, supra* at 271;

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[28]While respondent has not measured the same, it would seem that the prison staff personnel involved in the type of meaningful hearing described herein would gain the same advantages in having "their version" heard and tested as would the inmate. *See, Joint Anti-Fascist Refugee Committee v. McGrath, supra* at 172 & n. 19.

Landman v. Royster, supra at 653.[29] This written record will also serve as the basis for any appeal or review of the discipline imposed by the reviewing authority. Such a record may prevent adverse disciplinary determinations which are unsupported by the evidence adduced, *Cf., Arciniega v. Freeman,* 404 U.S. 4 (1971); *Thompson v. Louisville,* 362 U.S. 199 (1960).[30]

Nebraska admits that disciplinary hearings, because they promote a sense of fairness and increase the reliability of adjudications, are sound correctional policy. (Brief of the Petitioners at 21). Each of the model acts and policies quoted in the State's brief encourage the use of fair procedures in disciplinary hearings.

The most recent, comprehensive study of corrections, the Department of Justice sponsored *Corrections* (1973) recommends that prisoners charged with major rule violations be allowed prior notice of charges, lay counsel, an impartial tribunal, an opportunity to present and to confront witnesses, and a written decision subject to higher administrative review. *Id.*, Standard 2.12 at 51-2.[31]

The willingness of the various professional corrections groups to adopt these policies belies any argument that

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[29]According to the ABA Resource Center Survey, *supra* at 11 (Appendix A) thirty-eight jurisdictions render a written decision.

[30]Forty-four prison systems provide for such an appeal, although only twenty-seven specifically inform the inmate of his right to appeal, ABA Resource Center Survey, *supra* at 11 (Appendix A).

[31]The Commission's "Commentary" to Standard 2.12 notes:

> Correctional systems on their own initiative have implemented detailed disciplinary procedures incorporating substantial portions of the recognized elements of administrative agency due process. *Corrections* at 52.

hearings are overly burdensome to administrative convenience and economy, or that some elusive prison "code" makes inmates unreceptive to fair treatment. Moreover, there is absolutely no evidence in this record from which one can conclude that procedures impinge upon institutional control.[32]

To the contrary, there is an admission that the vast majority of the disciplinary reports in Nebraska result in admissions of guilt, obviating the need for most fact-finding hearings, (A.31).

Requiring procedural due process inside prison walls does not restrict the proper exercise of discretion by experienced correctional personnel. Rather, it helps to prevent the flagrant abuses historically perpetrated in the guise of expertise and that, after all, is the purpose of due process.[33]

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[32]No evidence on this point was presented to the trial court by either party, probably because the District Court felt constrained to follow the Eighth Circuit's decision in *Morrissey v. Brewer*, 443 F.2d 942 (8th Cir. 1971) that no due process at all was required, and thus it did not reach the question. In its reversal, the Eighth Circuit specifically ordered the District Court to "establish minimum procedural due process requirements" 483 F.2d at 1064, at remand hearings, where both parties would be able to present evidence.

[33]"It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that makes much of the difference between rule of law and rule by fiat." *Wisconsin v. Constantineau*, 408 U.S. 433, 436 (1971).

II.

THE COURT OF APPEALS PROPERLY DETERMINED THAT, IN ORDER TO ASSURE FUNDAMENTAL FAIRNESS, COUNSEL MAY BE NECESSARY IN A LIMITED NUMBER OF DISCIPLINARY HEARINGS.

In reversing the District Court's decision that procedural due process was not required in prison disciplinary hearings, the Eighth Circuit ordered the District Court to generally follow "the procedural requirements outlined . . . in *Morrissey*, and as supplemented by *Gagnon v. Scarpelli*, 411 U.S. 788 . . . " 483 F.2d at 1059. The Court of Appeals added that:

> specific requirements, including the circumstances in which counsel *may* be required, should be laid down by the District Court after further hearings. 483 F.2d. at 1063 (Emphasis added).

Although the District Court has never acted upon this remand, and there is no single instance in which counsel has been required, Nebraska now argues that counsel should never be required in any disciplinary hearing.[34] The State argues that "untold thousands of civil rights cases" would inevitably result, that disciplinary pro-

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[34]The Eighth Circuit rejected this argument in its denial of the State's Petition for Rehearing:

> Our opinion . . . does not require the state to provide or permit legal counsel to every state prisoner involved in a prison disciplinary hearing which may result in a serious penalty. Rather, we follow *Gagnon v. Scarpelli* . . . in holding that counsel is required only in those cases where fundamental fairness cannot be achieved absent counsel. 483 F.2d at 1067. (Citations omitted).

ceedings would cease to function, and that the inmates have no substantial interests justifying counsel in such proceedings, Brief of the Petitioners at 42-3.

There is absolutely no factual data in the record to support the State's dismal forecasts. The assertion that fundamental fairness may *never* require counsel overlooks the possibility:

> that the effectiveness of the guaranteed [by due process] may in some circumstances depend on the use of skills which the [prisoner] is unlikely to possess. *Gagnon v. Scarpelli,* 411 U.S. 778, 786.

Disciplinary hearings, like parole revocation hearings, are informal in nature and do not require technical rules of evidence, but there likewise may be situations where a prisoner, faced with a major rule violation,

> may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examing of witnesses or the offering or dissecting of complex documentary evidence. *Id.* at 787.

The Eighth Circuit did not hold, nor has *McDonnell* ever contended, that counsel is required in every disciplinary hearing. Rather, taking into consideration the practical difficulties and the comparatively informal nature of disciplinary hearings, it is urged that the same type of case by case approach recently deemed adequate by this Court in *Gagnon* be applied in these circumstances as well.

> The need for counsel at revocation hearings derives not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases. *Id.* at 790.

The practical impact of applying *Gagnon* to disciplinary hearings would be minimal. There are likely to

be very few instances where evidence is complex and not readily at hand, and if lay representation is provided,[35] the number of cases in which attorneys would be necessary is further reduced. Moreover, the record clearly reflects that only a small percentage of disciplinary charges ever result in any type of hearing at all.[36]

Without benefit of any factual findings by the District Court on this issue, it is particularly difficult for Respondents to suggest precise circumstances in which counsel's presence may be necessary, and indeed this Court, in *Gagnon,* stated that

> It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. 411 U.S. at 790.

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[35]Contrary to Nebraska's prognostications about the results of allowing representation, recent experiences with various types of lay representation (students, staff, other inmates) have not resulted in detrimental side effects, *See, e.g.,* "Providing Legal Services to Prisoners: An Analysis and Report", ABA Commission on Correctional Facilities and Services (May, 1973); Jacob and Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process,* 18 KAN. L. REV. 493, 589-613 (1970) (hereinafter referred Jacob and Sharma); *Corrections,* Standard 2.2. There is no reason to believe that use of attorneys in a small number of cases will pose any greater risks to administration than does the use of law students or other inmates.

[36]Warden Wolff testified that inmates "in the most part will admit their guilt in something that they are involved in" and these cases are resolved without a hearing, A.31. He went on to say that "a very small number . . . require additional investigation and there are some cases that only the Adjustment Committee can resolve . . . These are a small number, though, a very small percentage." A.31-2.

However, it is possible to postulate some broad guidelines to aid the factfinder in determining when counsel is necessary. To do so is not to suggest that any one of the criteria in and of itself (except perhaps violation of a criminal statute) is sufficient to require counsel, but merely to highlight the kinds of situations in which the concerns of *Gagnon* may be present.

Also, when a request for appointment of counsel is made and refused "the grounds for refusal should be stated strictly in the record." *Gagnon v. Scarpelli, supra* at 791.

One such guideline is the ability of the particular inmate to defend himself. *Gagnon v. Scarpelli, supra; Cf. Powell v. Alabama,* 287 U.S. 45, 68-9 (1932). Studies reflect that incarcerated persons have not generally attained a high level of educational achievement, and that their "I.Q." results are lower than the general population.[37] Additionally, there is a higher incidence of mental retardation in prison populations.[38] Thus, a particular inmate may have great difficulty in understanding or defending the charges, and may require assistance to assure fairness.

Another possible consideration would be the complexity of the factual determination to be made, *Gagnon v. Scarpelli, supra.* Factors such as the number of witnesses to be called, the extent of the testimony, and the nature of the facts in dispute should be weighed in light of the inmate's capabilities.

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[37]*See,* the studies reported in Jacob and Sharma, *supra* at 508-9; President's Commission on Law Enforcement and Administration of Justice, *Corrections* at 2 (1967).

[38]Jacob and Sharma, *supra* at 508-9.

A third criteria to be considered is the severity of the potential punishments that may be imposed as a result of the hearing, *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 36-7 (1972). Thus, where an inmate faces a potential loss of good time, resulting in increased confinement, there may be a concomitant increase in the need for an attorney's assistance.[39] Likewise, the prospect of extended confinement in isolation is a potentially severe punishment which might justify the need for a lawyer.[40]

The violation of a prison rule may also result in the violation of a criminal statute. In such situations not only does an inmate face potential in-prison punishment, but also the prospect that the information and evidence presented to a disciplinary hearing, including his own testimony, may be the basis of a subsequent criminal charge. It is clear that questioning an incarcerated person suspected of a crime is a custodial interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mathis v. United States*, 391 U.S. 1, 4 (1968). The accused inmate may need assistance in deciding whether to testify or to remain silent before the disciplinary board.[41] Thus, in determining whether the gravity of the

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[39]The District Court found that, for example, inmate Jackson lost 70 days of good time, 342 F. Supp. at 626; Inmate Maxwell "lost all the good time he could possibly earn in the future," *Id.* at 627; Inmate Johnson lost all of his good time, *Id.*, Inmate Rollins lost 38 days incentive good time and 16 *months* of statutory good time. *Id.*

[40]Inmate Rice spent 43 days isolated in the "Adjustment Center" 342 F. Supp. at 627; Inmate Hart "was placed in solitary for a month." *Id.*

[41]*See*, Turner and Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 Buffalo L.Rev. 759 (1972); *Cluchette v. Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *People v. Dorado*, 62 Cal. 2d 388, 398 P.2d 361 (1965).

offense is such as to require counsel, great weight should be given the fact that the rule violation is also a crime.[42]

In sum, there are no functional or practical differences between parole revocation hearings and disciplinary hearings for major prison offenses. The Eighth Circuit properly ordered the District Court to determine what circumstances, if any, would require counsel's presence. There are, as has been suggested, sufficient criteria available for guiding such discretion.

The State's dire predictions of institutional chaos are unsupported by the evidence in the record. While counsel is clearly *not* required in *every* informal administrative hearing, it is also clear that "there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent [prisoners]." *Gagnon v. Scarpelli, supra* 411 U.S. at 790.

III.

FULL APPLICATION OF CONSTITUTIONAL STANDARDS IS NECESSARY AND REQUIRED WHEN THEIR PURPOSE IS TO MINIMIZE OR AVOID ARBITRARY OR UNRELIABLE RESULTS.

In this action the plaintiff prays for a declaratory judgment of the rights and legal relations of the parties in

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[42]Some federal courts have attempted to solve this constitutional dilemma by other means. In *Palmigiano v. Baxter*, 487 F.2d 1280, 1289, (1st Cir. 1973), the First Circuit held that the accused should be granted "use" immunity for statements made in a disciplinary hearing when subsequent criminal charges were filed. *See also, Carter v. McGinnis*, 351 F. Supp. 787 (W.D.N.Y. 1972); *Cf. Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2nd Cir. 1971); *Nelson v. Sard*, 402 F.2d 653, 655 (D.C. Cir. 1968).

connection with the matters referred to in his amended complaint. (*See*, R. Vol. I., Amended Complaint, prayer for relief 1, at 14). The defendants assert that the Court of Appeals has broken original ground in applying relief to the plaintiff class "retroactively." (Pet. for Cert. at 17).

Initially it must be understood that it was not ordered or determined by the Court of Appeals that there should be expunged from prison records all determinations of misconduct, rather the Court of Appeals held that it would be:

> appropriate for the District Court to order expunged from prison records, determinations of misconduct [presumably from hearings which could have resulted in serious penalties to a prisoner] which such determinations were arrived at in hearings that failed to comport with minimum due process requirements. 483 F.2d at 1058.

On remand the District Court was ordered to "determine what procedures are necessary to meet minimum procedural due process standards," and determine whether such standards are being met. If "the defendant is not meeting these standards, the Court may grant such declaratory and injunctive relief as it deems necessary, except that it may not restore good time." 483 F.2d at 1058.

Assume, *arguendo*, that the District Court determines that the procedures necessary to meet minimum procedural due process standards have not been met in disciplinary hearings which have resulted in serious penalties and "grievous loss" to prisoners still incarcerated in the prison. Such prisoners should have the underlying determination of misconduct which led to the imposition of serious punishment expunged from their

records to prevent further "grievous loss" from being inflicted upon the prisoner.[43]

Furthermore, the prison has as great an interest as the prisoner in having such a record entry expunged from the prisoner's permanent record. *See, Morrissey v. Brewer, supra* at 495: "Yet, the State has no interest in revoking parole [–imposing serious penalties–] without some informal procedural guarantees."

Therefore, while the plaintiff sought adjudication and declaration of the rights and legal relations of the parties in this action in connection with matters referred to in his amended complaint, and presented at trial, it is not difficult to understand why the Court of Appeals felt that it would be "appropriate" relief to the plaintiff class to order expunged from a prisoner's records determinations of misconduct which were the fruits of hearings of which the "truth-finding function" had been the object of constitutional attack.

As this Court has held:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application of these circumstances.
>
> "It is quite different where the purpose of the new constitutional standards proscribing the use of cer-

[43] *See*, Note 11, *supra*.

tain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends." *Williams v. United States*, 401 U.S. 646, 653 (1971).

It was, of course, the concern of the Eighth Circuit, "to minimize or avoid arbitrary or unreliable results" when it held that expungement of past determinations of misconduct would be appropriate should the District Court find on remand that minimum procedural standards were not followed when inmates were given disciplinary hearings for which substantial penalties could be imposed upon them.

In prison disciplinary hearings there are no other procedural safeguards upon which the validity of the factfinding process can be otherwise anchored. *See, Johnson v. New Jersey*, 384 U.S. 719 (1966). There is also, unfortunately, ample evidence from the federal trial courts and in this record that the factfinding process has in the past not been reliable.[44]

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[44] *Landman v. Royster, supra* at 650; *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *McDonnell v. Wolff*, 342 F. Supp. at 627: "It is evident that the procedure described by Warden Wolff in his testimony is not in practice been followed in all instances"; Testimony of Inmate Rice, A.41. *See also*, California Assembly Select Committee on Prison Reform and Rehabilitation, Alias: The Hole, Lockup, Solitary Confinement and the Adjustment Center (1973), Appendix C hereto:

Recommendation No. 2 – Disciplinary Hearings

Existing procedures to safeguard the prisioners' rights in disciplinary hearings are frequently not followed. In spite of the American Justice System, convicts are often presumed to be guilty, when suspected of new crimes. Therefore, hearings are concerned primarily with punishment rather than determining guilt. The arbitrary, unchecked, and overwhelming power of the Disciplinary and Classification Committees is smothering the right of the prisoner to due process. *Id.* at -6-.

In light of both the prisoner's and the State's overriding and shared interest in not having action taken against a prisoner which is based on anything other than reliably determined facts, the appropriateness of expunging unreliable findings of prisoner misconduct is clear. This Court has recognized in both *Morrissey v. Brewer, supra* and *Gagnon v. Scarpelli, supra,* that both societal and prisoner interests lie in "neither unnecessarily interrupting successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon v. Scarpelli, supra* at 785.[45]

Notwithstanding assertions to the contrary, giving the full force of law to a decision which determines constitutional rights is not a "novel doctrine" of constitutional law. *Linkletter v. Walker,* 381 U.S. 618, 622-23 (1965):

> At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to "pronounce a new law, but to maintain and expound the old one." 1 Blackstone, Commentaries 69 (15th ed. 1809). This court followed that rule in *Norton v. Shelby County,* 418 U.S. 425 (1886), holding that unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, inoperative as though it had never been passed." At 422. The judge rather than being the creator of the law was the discoverer. Gray, Nature and Sources of the Law 222 (1st ed. 1909).

Later decisions applying *Linkletter* have amplified this Court's considerations when deciding constitutional

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[45] *See also, Cooper v. Lockhart,* 489 F.2d 308 (8th Cir. 1973).

doctrine in this area. *Stovall v. Denno,* 388 U.S. 293 (1967), employed a three-fold test directed at discovering (1) the *purpose* to be served by the new standards, (2) the extent of the *reliance* by the law enforcement authorities on the old standards, and (3) the *effect* of the administration of justice of a retroactive application of the new standards.

While the petitioners in this action have not attempted to make a *Linkletter-Stovall* showing of the "reliance and effect" considerations versus the "purpose" considerations in applying the relief fashioned by the Court of Appeals, attention focused on this expungement point in the lower courts. *See, Adams v. Carlson,* 488 F.2d 619, 628 (7th Cir. 1973).[46]

The discussion above highlights the overwhelming importance of the *purpose* served by giving the Court of Appeals' direction full application to the plaintiff class. A brief look at the effect of such application is of interest.

[46]"We will, nevertheless, continue on to examine the factors of reliance by and impact upon agencies of law enforcement. On the whole, they bolster, not weaken our conclusion.

The reliance which prison officials have placed on *Pate* and its predecessors cannot be gainsaid, but neither can the fact that their provision of a new hearing to segregate inmates is far less likely to disrupt the administration of justice then were the retrials which would have resulted had *Linkletter* come out the other way or had *Adams,* where not only a new trial but a new indictment and preliminary hearing would have been required. A rehearing under *Miller* is a much less complex and time-consuming matter than a criminal retrial. Moreover, a *Miller* rehearing raises a relatively minor problem of lost or forgetful witnesses since it is fair to say that segregation is typically a shorter affair by far than the term of a criminal sentence." *Adams v. Carlson, supra* at 628 (Footnotes omitted).

As has been explained, the Eighth Circuit held that until such time as it is determined that Nebraska remedies have been exhausted, the plaintiff McDonnell is not entitled to have any forfeited good time returned to him. The amended complaint in this action does seek *restoration* of good time for the plaintiff class representatives, Robert O. McDonnell. It seeks declaratory relief only, however, as to the rights of the other members of the class. Therefore, not only after *Preiser*, even prior to *Preiser*, the balance of the inmate plaintiff class has the burden of individually coming forward to seek relief for restoration for forfeited good time in appropriate actions in either state or federal court. Such individual claims for relief would, undeniably, be based upon the relief obtained for the inmate class on the issue of the constitutional adequateness of the disciplinary hearings which has been given by the defendants before forfeiture of accumulated good time was ordered.

It is obvious that the "retroactive" effect of the Court of Appeals' decision goes only to the expungement of eligible determinations of misconduct from the records of prisoners who remain incarcerated in the prison. No prisoner will have his time for consideration as to parole eligibility accelerated by such expungement without the further determination, in some appropriate proceeding, that needed good time, which may have been unlawfully taken from him, should be restored.

Furthermore, nothing will prevent the prison from giving meaningful hearings to prisoners whose conduct has been such that the prison believes societal interest requires that reliable findings of misconduct be included in the prisoner's file, be it to effect the prisoner's eligibility for discharge, release under parole, or other release under supervision from the prison.

As *Williams* holds "good faith reliance" on prior constitutional law or accepted practices cannot suffice to require only prospective application of the law when the major purpose of "new constitutional doctrine is to overcome" an aspect of a proceeding which "substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, * * * " 401 U.S. at 653.

In the absence of any definitive presentation by the petitioner of any adverse *effect* which giving the full force of law to the Court of Appeals' decision would have on the prison or society, and in view of society's and the inmates' overriding interest in the *purpose* served by giving the members of the plaintiff class the full benefit of the lower court holding, the propriety of *not* applying the relief of the Court of Appeals in a solely "prospective" manner is clear.[47]

IV.

DUE PROCESS ASSURES THAT THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS WILL NOT BE ABRIDGED OR RESTRICTED WITHOUT SUBSTANTIAL AND CONVINCING JUSTIFICATION.

The Court of Appeals affirmed the District Court's holding that due process prohibits the censoring or

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[47] *See, Berry v. Cincinnati,* 414 U.S. 29 (1973), giving all those convicted prior to the decision in *Argersinger v. Hamlin, supra,* the benefit of that constitutional rule. It seems clear that the results of "conviction" before a disciplinary committee have a far more profound effect on the prisoner's life and liberty than do convictions for misdemeanors in our society. *See also, Robinson v. Neil,* 409 U.S. 505 (1972)

opening[48] of an inmate's confidential mail to and from his attorney in order to insure that the plaintiff's First, Sixth and Fourteenth Amendment rights are protected.

The test which the Court of Appeals used in sustaining the District Court's order was:

> Prison authorities must show that the regulation of an inmate's right to send and receive mail furthers a substantial interest, and that the incidential restrictions placed on an inmate's rights are no greater than essential to further that interest. *Cf.*, United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); Nolan v. Fitzpatrick, 451 F.2d 545, 548 (1st Cir. 1971); Note, Prison Mail Censorship and the First Amendment, 81 Yale L.Rev. 87, 94-104 (1971). The District Court's order comports with these principles, and we affirm it in this respect. 483 F.2d at 1067.

In this Court the defendants concede the valuable First and Fourteenth Amendments interests which prisoners have in petitioning their Government for redress of grievances.[49] The plaintiff's Sixth Amendment rights on this issue were largely settled by stipulation and order at trial.

The exercise of the plaintiff's rights involves prisoners in communicating with the judicial branch of government

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[48]342 F. Supp. at 625; 483 F.2d at 1066.

The prison had regularly read and censored all correspondence to and from prisoners to persons outside the prison, including attorneys, but the defendants assert that they have now abandoned that practice. *See* 342 F. Supp. at 622.

[49]Brief of the Petitioners at 46; Petition for Writ of Certiorari at 15.

The defendants have changed their position on this issue dramatically since the trial. A.38.

directly, as well as through their attorneys, who are officers of the judicial branch. It is not contested that effective assistance of counsel is an integral part of the right to petition the Courts for redress of grievances. *McMann v. Richardson*, 397 U.S. 759 (1970).

In order to protect this right, the Court of Appeals held that attorney mail could *not* be opened unless the prison officials demonstrated that there is a "real possibility" that a particular attorney may be sending contraband through the mails and into the prison, and that the available mechanical devices, or other alternatives for detection, would fail to disclose such contraband.[50] In these instances prison officials may open mail. However, if an envelope from an attorney is marked "privileged" or "attorney-client mail," then, and in that event, that mail may not be opened except in the presence of the inmate-addressee for the purpose of intercepting such contraband as may be included in the mail. 342 F. Supp. at 625; 483 F.2d at 1066.

Nebraska, while conceding that it does not have the right to censor or delay mail,[51] argues that it does have

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[50]There are methods to protect the legitimate societal interests described by defendants in preliminary hearings in this proceeding. *See*, 483 F.2d at 1066-67; *Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972).

[51]*See*, 342 F. Supp. at 622. This abuse by penal authorities is not peculiar only to the Nebraska prison, and has been described in *Corrections*, Standard 2.17 Access to the Public, 67:

> Mail. In censoring or regulating mail, correctional authorities have not limited themselves to keeping out harmful or potentially dangerous objects or substances. The censorship of mail all too often has been utilized to exclude ideas deemed by the censor to be threatening or harmful to offenders or critical of the correctional agency. These efforts result in the diversion of manpower from other tasks and, to

an obligation to stop contraband, and that the Eighth Circuit's holding unduly impinges upon this obligation.

It argues that all attorneys present a "real possibility" of being potential smugglers of contraband into a prison through the mails, and therefore, all legal mail should be opened in the presence of the inmate-addressee. It further contends that ascertaining the proper identity of attorneys unknown to prison officials cannot be easily accomplished.[52]

These arguments miss the mark. Once the State concedes that the right of the inmate to correspond freely with counsel in furtherance of access to the courts is protected, it must then bear the burden of justifying those situations where it believes that interference with legal mail is necessary. It is incongruous to recognize lawyers as officers of the court, under a professional oath and subject to administrative and penal sanctions for abuse of such oath, and then to assert that lawyers, as a class, are untrustworthy and reliable.

The Court of Appeals has rejected such "all or nothing" treatment, and has provided that officials must

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avoid excessive manpower traits, limitations on the volume of correspondence permitted. Censorship or limitations on correspondence directly generate inmate hostilities and serve to make correctional progress more difficult.

Courts began to look critically at this process when it came to their attention that correctional authorities were limiting access to courts. Instances of failure to mail complaints, invasion of privileged attorney-client communications, and reprisals against inmates for attempting to send out information about deficient conditions were documented. Limitations on access to religious materials were also discovered and criticized.

[52] *See*, A.38.

deal only with those lawyers for whom there are reasonable grounds–a "real possibility"–to suspect unprofessional or illegal conduct.[53]

From an efficiency standpoint, it is clear that *not* opening the majority of attorney mail would greatly reduce the time and effort of staff otherwise consumed by mail processing. It would allow time to pay greater attention to those few cases where reasonable grounds for suspicion do, in fact, exist.

Attorneys who are members of the State bar are readily screened, as are those out-of-state attorneys who are known, for one reason or another, to prison officials. For those out-of-state lawyers unknown to the institution, such procedures as routine form letters addressed to the attorney requesting information about him could be utilized by the prison to gather information; phone calls

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[53] *See also, Adams v. Carlson,* 488 F.2d 619, 631-32 (7th Cir. 1973), where that Court of Appeals, in discussing the arrangement of a prison's visiting room discussed the importance of attorney-client communication, which discussion seems as applicable to mail as the visiting room therein the subject:

> To justify his impairment of communication between attorneys and inmates in the name of security, a prison warden must come forward with facts which tend to support a reasonable suspicion not only that contraband is being smuggled to inmates in the fact of established preventive measures, but that their attorneys are engaged in the smuggling. We ground the last requirement on our unwillingness to assume that attorneys–admittedly the partisan advocates in court of their clients' cause–are more willing or more inclined to smuggle contraband past prison officials than are other outsiders who deal with inmates, as well as on our recognition of the constitutional importance of the business which an attorney typically conducts with an inmate, * * *

could be directed to parties known reliable for information concerning the lawyer, or appropriate bar associations contacted.

Perhaps, where substantial doubts continue to exist, a letter could be delayed until further and more reliable data concerning a lawyer could be gathered, or authorization to inspect the mail from such a lawyer could be obtained from the attorney himself. It must be emphasized that such checks need be done only one time for each "suspect" or, conceivably, only periodically as the need arises. There would be no need for a continuous, ongoing process of investigation for every lawyer desiring to contact his client in the prison. Since the bulk of all lawyers will undoubtedly be locally known or investigable, checks upon these persons, if deemed necessary, are *not* unreasonably burdensome when weighed against the protected interest of the prisoner.

What the constitution requires is clear and has been conceded. What remains is for the defendants to implement mailing regulations pursuant to the constitutional standards required and conceded. To argue to this Court for "permission" to utilize a "simpler" method does not seem proper. *Morrissey v. Brewer, supra* at 488:

> We cannot write a code of procedure; that is the responsibility of each State. Most states have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. (Footnotes omitted).

As the defendants assert no substantial interest to this Court other than "convenience" for reversing the Eighth Circuit Court of Appeals, it is difficult to conclude that anything other than affirmance of the Court of Appeals on this issue is necessary.

V.

DUE PROCESS ASSURES ACCESS TO THE COURTS FOR REDRESS OF CONSTITUTIONAL VIOLATIONS REGARDLESS OF THE FORM OF ACTION.

In *Johnson v. Avery*, 393 U.S. 483 (1969), this Court said:

> It is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. 393 U.S. at 485.

The Court went on to hold that so long as a state did not provide reasonable alternative means of legal assistance to indigent inmates, a prohibition against inmates assisting one another on legal matters was unconstitutional, 393 U.S. at 490.

The Eighth Circuit, in applying *Johnson v. Avery* to the instant situation, held:

> The burden is on the defendants to demonstrate that they are providing a reasonable alternative . . . In meeting this burden, the defendants must produce evidence establishing in specific terms *what the need is for legal assistance* . . . Furthermore, in determining the need for legal assistance, the defendants must take into account the need for assistance in civil rights actions as well as habeas corpus suits. 483 F.2d at 1065 (Citations omitted) (Emphasis is original).

Nebraska contends that the Eighth Circuit erred in requiring that civil rights actions be included in determining the need for legal assistance.[54] The State argues

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[54]It must be emphasized that the Eighth Circuit's description of "civil rights actions" is not limited to *federal* remedies, *e.g.*, 42 U.S.C. §1983, anymore than *Johnson v. Avery* was limited solely to federal *habeas corpus*.

that the right of access to the courts is limited solely to *habeas corpus* petitions.

This interpretation is too restrictive. As this Court said in *Boddie v. Connecticut, supra* at 374-5:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members . . .
>
> Without this guarantee that one cannot be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable . . .

Ex Parte Hull, 312 U.S. 546 (1941), established that "the state and its officers may not abridge or impair petitioner's rights to apply to a federal court for a writ of habeas corpus," *Id.* at 549.[55] *Johnson v. Avery, supra* reiterated that:

> It is fundamental that access of prisoners to the courts for the purpose of presenting their *complaints* may not be denied or obstructed. 393 U.S. at 485 (Emphasis added).

Common to *habeas corpus* petitions and civil rights complaints is the fact that both are directed at redressing violations of constitutional rights which arise directly from the fact or nature of the prisoner's confinement.[56]

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[55]Although the Court specifically referred to *habeas corpus* petitions because that was the nature of the writ filed in *Hull*, the regulation in question required prior approval of "all legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals," 312 U.S. at 548. The Court simply concluded "The regulation is invalid," 312 U.S. at 549.

[56]It is instructive to note that even the specific prison regulation challenged herein does not draw a distinction between *habeas corpus* petitions, civil rights cases, or other forms of actions. It

Indeed, this Court has already recognized instances where the same constitutional rights might be redressed under either form of relief, *Cf. Preiser v. Rodriguez, supra; Wilwording v. Swenson,* 404 U.S. 249 (1971). While the origins of *habeas corpus* may be, as Nebraska argues, more firmly rooted in Anglo-Saxon tradition, the comparatively recent origins of a statute similarly designed to protect basic rights is clearly an insufficient distinction to justify different treatment for the two forms of action.

In affirming a decision which required state officials to provide indigent inmates with access to a reasonable law library for preparation of legal actions, this Court made no distinctions between civil rights cases and *habeas corpus* petitions, *Younger v. Gilmore,* 404 U.S. 15 (1971), nor did the three judge court whose judgment was upheld:

> "Access to the courts," then, is a larger concept than that put forward by the state. It encompasses all the means a defendant or petitioner might require to get a fair hearing on all charges brought against him or *grievances alleged by him* . . . some provision must be made to ensure that prisoners have the assistance necessary to file petitions and *complaints* which will in fact be fully considered by the courts. *Gilmore v. Lynch,* 319 F. Supp. 105, 110 (N.C. Cal. 1970) (Emphasis added).

See also, Cruz v. Hauck, 404 U.S. 59 (1971).

Moreover, the underlying policy considerations discussed in *Johnson v. Avery* are exactly the same for *habeas corpus* petitioners and civil rights complainants. A high percentage of prisoners filing either type of claim are

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simply refers to a "legal advisor" who has been appointed for the benefit of those in need of "legal assistance." 483 F.2d at 1065.

"totally or functionally illiterate", have "slight" educational attainments, or "limited" intelligence, and thus are in greater need of assistance in protecting their constitutional rights, *Johnson v. Avery, supra* at 487. *See also,* Jacob and Sharma at 508. The State's interest in "controlling" the prison writ writer is the same regardless of the type of action filed, and the same type of "reasonable restrictions" authorized in *Johnson v. Avery* with respect to compensation, time, and location of writ writers' activities, are available, 393 U.S. at 490. Additionally, since *Johnson,* burgeoning numbers of prison legal assistance programs continue to demonstrate that reasonable alternatives can, and do, exist. *See generally,* "Providing Legal Services to Prisoners: An Analysis and Report," American Bar Association Commission on Correctional Facilities and Services, (May, 1973).[57]

Legal assistance programs have been recognized to be of such value that the National Advisory Commission on Criminal Justice Standards and Goals has recommended that free *legal* counsel be accorded indigent inmates in *all* matters relating to their care, custody, and confinement, *Corrections,* Standards 2.2 at 26.

Finally, the Eighth Circuit's conclusion with regard to including civil rights suits in an inmate legal assistance

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[57] This "Report" also contains recent data responsive to Nebraska's assertion that increased legal assistance will necessarily lead to increased federal caseloads. It estimates that only 3% of prisoners' problems are "Prisoners' Rights Cases," *Id.* at 10. And to the contrary, the report discloses that increased legal assistance can result in a *decrease* of docketed cases by screening out frivolous cases and by encouring administrative redress. Moreover, those cases which are filed may be more artfully prepared and researched, thus cutting down the time and energy expended by the judiciary. *Id.* at 10-14.

plan is unanimously shared by the other federal courts which have specifically considered the question. *Andrade v. Hauck*, 452 F.2d 1071 (5th Cir. 1971); *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970); *Cross v. Powers*, 328 F. Supp. 899 (W.D. Wis. 1971). The Eighth Circuit has also reaffirmed its position in this regard, *Noorlander v. Ciccone*, 489 F.2d 642, 650 (8th Cir. 1973).

The right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental rights. Whether a prisoner, without formal training in the law, styles his claim as a petition for *habeas corpus* or as a civil rights action, the essence of the complaint is that constitutional rights have been violated. Correctional authorities bear a heavy burden of justification for prison rules which restrict such actions. The Eighth Circuit's remand to the District Court for proof of such justification is proper.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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April 6, 1974

APPENDIX A

SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES

Prepared by

RESOURCE CENTER ON CORRECTIONAL

LAW AND LEGAL SERVICES

American Bar Association

Commission on Correctional Facilities and Services

Washington, D.C. March 1974

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SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES

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PREFACE

When the "hands-off" barrier to judicial review of prison matters fell, the first problems dealt with by the courts were specific rights and specific practices. As the judiciary has gained knowledge and experience in working with correctional issues, its attention has been directed to the more complicated areas of correctional administration. Most recently, the Supreme Court has begun to review a variety of correctional issues.

These developments have evoked an unprecedented response. The number and variety of individual scholars and organizations that have looked closely at correctional problems and contributed valuable surveys and analyses toward their solution is impressive indeed. A succession of national commissions have dealt with these same problems at increasingly fine levels of detail.

This report is addressed to one area - the prison disciplinary process - which has heretofore escaped factual examination. We have tried to develop a picture of individual state and national practices which can serve as a back-drop for the present judicial consideration of what due process requires in the way of disciplinary procedures.

Many individual prison officials and assistant state attorneys general provided the information on which this survey is based. Their assistance is gratefully acknowledged. Two New Jersey officials deserve special thanks - Joseph T. Maloney and Joseph DeMarco. Deputy Attorney General Maloney collected and analyzed considerable material from 43 states regarding confrontation and cross-examination, thus easing our task. Mr. DeMarco, deputy clerk of the New Jersey Supreme Court, greatly facilitated our examination of the Maloney materials, which had been filed with the Court. Mr. Justice Mathew O. Tobriner of the California Supreme Court and his former law clerk, Robert C. Vanderet, now a California practitioner, are also due special mention and thanks for making available a collection of data regarding prison disciplinary practices in 1972. This gave us a basis for judging the direction of change in this field.

Paul F. Attaguile and Ralph H. Loewenstein, Resource Center staff members, and Ellen Geis, a law student working with us under an externship program, collected, organized, and evaluated our data. This report is largely their accomplishment.

Melvin T. Axilbund
Project Director

I. INTRODUCTION

This examination of prison disciplinary practices is the most recent in a series of national surveys and monographs produced by the Resource Center on Correctional Law and Legal Services. Earlier investigations of similar scope have looked at such diverse topics as the implementation of Morrissey v. Brewer, 408 U.S. 471 (1972), by state parole boards, alternative programs for providing legal services to prisoners, state practices regarding sentence computation, and the number and type of conditions typically imposed on parolees.

The interests and mandate of the Resource Center are broader than these individual reports. The Resource Center was created in 1972 by the American Bar Association's Commission on Correctional Facilities and Services to keep track of, and advance, legal issues in correctional reform. Expansion of legal services for prisoners -- including manpower resources to deliver them -- and prison grievance mechanisms were other prime concerns described in the Resource Center's charter. The Ford Foundation and the Office of Economic Opportunity jointly fund the Resource Center.

The immense and pervasive impact of prison discipline on the daily lives of those confined in penal institutions has been a major concern of the Resource Center since its inception. The issue could hardly have been avoided. For at least three years the advance sheets have contained a steady stream of judicial decisions from many levels, each seeking to strike a proper balance between institutional needs and the interest in fairness of those who are being disciplined. The need for fair procedures is no longer questioned in the cases. What procedures are fair, and what circumstances trigger their application are the dominant issues. Mail to the Resource Center from prisoners, their lawyers and families, and also from correctional administrators has sought guidance on the meaning and application of these decisions.

A number of the Resource Center's earlier endeavors contributed to our understanding of the disciplinary process, and hopefully to that of others as well. As a briefing device for staff and a working document for our constituency, a monograph on discipline was developed shortly after the Resource Center was established. Entitled "Due Process in Disciplinary Hearings," the paper identified and analyzed the case law to 1972. Valuable experience in working with these precedents was gained in Louisiana. There the Resource Center represented the inmate population of the Louisiana State Penitentiary in a mediation of disciplinary issues conducted with the assistance of the Community Relations Service of the U.S. Department of Justice. The negotiating sessions, after several months of work, produced agreements on revised rules of conduct (with corresponding schedules of penalties for violations of the rules) and a

new institutional rule book to convey this information.

From our examination of the cases, we became aware that large gaps existed in our knowledge of disciplinary practices. (Our case-tracking has recently been memorialized in a special supplement to the Prison Law Reporter. This was composed of a bibliography of federal and state cases and significant law review articles on the major topics of correctional law, of which discipline formed a significant part.) Just now, when the volume of pending litigation seems to be arousing broad interest in changing existing procedures, the absence of a source of base-line data on existing disciplinary practices seemed particularly regrettable and appeared likely to make a difficult task harder.

Good law cannot be made in a vacuum. The number and variety of cases dealing with prison discipline was such as to make it probably inevitable that the Supreme Court would ultimately look at this matter. Our concern with that anticipated examination was that it would not be sufficiently grounded in the experiences of correctional agencies. A comprehensive national survey of state and federal practices was needed. Consequently, we began last fall to collect institutional handbooks and administrative regulations in an attempt to overcome this deficiency. After this work began, the Supreme Court did indeed agree to hear a prison discipline case, Wolff v. McDonnell, No. 73-679, this year. It is likely, therefore, that before too much longer the guiding principles in this area will be enunciated. The uncertainty which has plagued correctional administrators and prisoners alike as they try to glean direction from non-congruent cases arising from diverse factual circumstances will be displaced by rules anchored on constitutional bedrock.

There is another reason to welcome this development quite apart from the resolution of conflicts in the cases. As will be seen below, 75% of the most commonly identified elements of disciplinary process are available to inmates in a majority of jurisdictions in each case. This is not, however (except where a case or statute so dictates), on the basis that the procedure is a "right." This broad employment of so many elements does not, apparently, even represent agreement that the disciplinary process must be based on accurate fact determinations, which the various procedures promote or make more certain. Those who debate the disciplinary process do not agree on its purpose.

Whatever other purposes they may have, prison discipline systems exist in part to punish misconduct. Because the punitive sanctions employed may be severe -- including the effective lengthening of a prison term -- we believe that the Due Process Clauses of the Constitution apply and mandate adherence to procedures calculated to bring about fundamentally fair results. Consequently, we have referred to various of the elements of disciplinary process as "rights". Suffice it to say th

by so characterizing them we do not mean to imply that their status has been settled. The pending Wolff case may help us to apply a permanent designation.

This survey is designed to serve two purposes. First, it reports on the individual judgments the states have made about the correct disciplinary procedure. We believe this report depicts with substantial accuracy the disciplinary practices which the states now employ. Some of these stem from the coercive effect of a court order. Some are rooted in state statutes. Others represent the local adoption of national standards, such as those proposed by the Association of State Correctional Administrators. They share the trait of operating to guide behavior on a daily basis. Whether individual states have properly evaluated the competing individual and societal values is uncertain; that a weighing has taken place in each jurisdiction is undeniable.

Second, the report shows the sum of many individual judgments. It depicts the collective judgment of correctional administrators, judges, lawyers, prisoners, and others about the appropriate balance of interests. Without some such tool the individual judgments of vocal or well placed individuals might be inordinantly magnified.* With a report like this, the virtually complete lack of empirical data on actual disciplinary practices is somewhat overcome.

The Resource Center's goal in embarking on this study was to make a modest contribution to the current process of determining fair prison disciplinary procedures. This we hope we have done.

*For example, the director of the Federal Bureau of Prisons recently characterized nearly complete due process in disciplinary proceedings as "totally unnecessary and unworkable besides." Carlson, Interview, 5 Corr. Dig. 2 (Jan. 23, 1974). The survey results seem to indicate this statement is hyperbole rather than hypothesis.

II. LIMITATIONS OF THE SURVEY

The survey findings which follow are based on the Resource Center's analysis of material derived from four principal sour A description of these sources will help the reader to understand the survey's limits and use the results.

SOURCES

1. Resource Center Files. In pursuit of its "clearinghouse" responsibility, the Resource Center has been collecting state regulations, law suit pleadings, reports, pertinent law journal articles, etc., since its inception in 1972. In November, 1973, letters were sent to each state department of corrections requesting their inmate handbooks or other statements of institutional rules and regulations to which inmates are subject. Over 80% of the states responded to this inquiry, resulting in a substantial expansion of our holdings. In an appendix we have listed the handbooks and rules made available to us. In about a dozen states, supplemental telephone contact was made to close major gaps in the data.

2. New Jersey Supreme Court Files. Avant v. Clifford, Docket No. 22-73, is now pending in the Supreme Court of New Jersey. Among other matters, the case puts in issue the right of inmates of New Jersey penal institutions to confront their accusers at disciplinary hearings and to cross-examine adverse witnesses at those proceedings (procedures which are not now in force). During oral argument on November 21, 1973, a justice of that court asked counsel for the state what the practice of other states was with respect to those rights. The state's attorney replied that he was uninformed on the point but that a survey would be undertaken and the court would be advised of the results. By December 4, 1973, Joseph T. Maloney, Deputy Attorney General, had written all state attorneys general and counsel for the Federal Bureau of Prisons. Follow-up letters to non-responding jurisdictions were mailed on January 4, 1974. A total of 43 of the 54 jurisdictions solicited responded. On February 8, 1974, the New Jersey 45 page report, denominated "Supplemental Brief and Appendix for Respondents," was filed. It summarized the thousands of pages of data collected. No copies of that material were made, because of its volume, but the entire collection was filed with the clerk of the cour Resource Center staff have examined this material at the clerk's office. We have included the state's recapitulation of the da as an appendix to this report.

3. Files of Mr. Justice Mathew O. Tobriner. In March, 1972, Mr. Justice Tobriner of the California Supreme Court initiated a survey of prison disciplinary practices. All but nineteen states provided him with substantive responses. Two articles have resulted from it: Tobriner, Due Process Behind Prison Walls, The Nation 367 (Oct. 18, 1972), and Vanderet,

Procedural Due Process in California Prisons, 48 Cal. St. Bar J. 669 (1973). The base data Mr. Justice Tobriner received was made available for inspection at our offices.

4. Law Journal Articles. A partial bibliography appears in an appendix.

From the above listing of sources and the survey findings themselves, one can infer the limitations of the survey. Lest there be any misunderstandings, we have set these forth below:

1. The report only deals with the generally applicable procedure for handling major disciplinary cases. This means that we have tried to ascertain and report on those policies which have statewide applicability. Where this was not possible, the practice reported is that in effect at the state's maximum security prison for men. We chose to focus on that institution because it is there that the disciplinary issues are probably most finely drawn.

Many states are adopting a two-tier disciplinary system. The first level is reserved for informal and summary adjustment of discipline problems. Most commonly in the exercise of delegated authority, any staff member who observes a minor rules infraction may counsel with the offending inmate and, if necessary, he may impose a sanction of quite limited impact and duration.* The second level is reserved for serious "beefs". It is here that a variety of safeguards begin to become effective. It is here that we focused.

2. All data is not given for each state. As previously noted, we relied substantially on the collection and analysis of written materials. Although we endeavored to close the main gaps in our data by direct contact with the particular department of corrections, we did not reach a knowledgeable spokesman in every instance.

3. Even where materials were available, it was not always possible to ascertain the state's practice. These "unascertained" practices are reflected in the chart in Section III as vacant cells. Rather than introduce biases into the data display, we avoided presumptions and speculation and only classified a state practice when it was fairly clear from the data made available to us.

*The National Advisory Commission on Criminal Justice Standards and Goals has recently suggested a bridge between the two tiers. Simply, when an inmate is dissatisfied with the informal process, he may obtain a review of the adverse action. See National Advisory Commission on Criminal Justice Standards and Goals, Report on Corrections, Standard 2.12 (1973).

4. The data are unverified. We have reported state practices as enunciated in the materials we reviewed. No independent field check of actual performance was undertaken. This is a significant observation because we have received assorted allegations from inmates (also unverified) that various protections have in fact not been provided in particular cases. Since we have personally observed such divergencies between claim and compliance, we tend to give such inmate complaints some credence. Nevertheless, our characterization of practices as "claimed" and similar terms is not intended in any pejorative sense. Such terms are intended only to remind the reader of the need for additional research in this field.

III. SURVEY FINDINGS

As the following chart and narrative indicate, most states claim to afford substantial rights and protections to inmates facing disciplinary charges.

For example, all of the states for which we were able to ascertain a policy provide the following procedural protections to inmates accused of intramural violations: (i) a set of written rules which specify conduct violative of the rules; (ii) an impartial tribunal to sit in judgment of alleged violations; (iii) the right to personally appear before the tribunal; (iv) the right to hear the evidence of the violation; and (v) the right to make a statement on his own behalf.

An additional five practices are followed by more than 90% of the jurisdictions with clear policies: (i) the accused inmate receives a copy of the rules of the institution; (ii) the inmate is given a written notice of charges against him in advance of a hearing; (iii) he also receives advance notice of the time of the hearing (although this may not be written); (iv) the inmate may appeal an adverse determination; and (v) some hearing record is made. As regards this last item, it should be noted that one third of the states have no stated policy.

We found one further group of practices on which at least 75% of the states enunciating policy agree. However, in contrast with the first two groups of practices reported above, where the affirmative responses were in the 40's and 50's, in this final group they are in the 20's and 30's. The five practices include (with number and percentage of affirmative responses indicated): (i) the inmate may have counsel-substitute at his discipline hearing - 39 states, 89% of ascertained practices; (ii) the tribunal renders the decision in writing - 38, 88%; (iii) the tribunal bases its decision solely on the evidence presented at the hearing - 29, 85%; (iv) the inmate is notified that he may appeal an adverse finding - 27, 84%; and (v) the inmate may secure a continuance in order to prepare his defense for the hearing - 27, 79%.

Three other practices also have majority support among those states with an adopted position: (i) the inmate may confront accusing witnesses - 31, 64%; (ii) the inmate may call relevant witnesses - 29, 59%; and (iii) the cross-examination of adverse witnesses is permitted - 28, 57%. As with the preceding group of practices, many of the states have not taken an ascertainable position on these issues. And, as the following narrative indicates, some states impose substantial restrictions on these procedures.

Each of the last three practices about which we inquired has few adherents at this time. Only 11 states relate specific sanctions to offenses in their written rules. Similarly, only 11 states expunge the inmate's record if he is found not guilty of the charged offense. Finally, just 14 states permit counsel to represent the inmate at disciplinary proceedings.

These findings are graphically depicted on the next page, and the narrative discussion of them begins thereafter.

ELEMENTS OF DISCIPLINARY PROCESS	ALA	ALASKA	ARIZ	ARK	CAL	COLO	CONN	DEL	D.C.	FLA	GA	HAWAII	IDAHO	ILL	IND	IOWA	KAN	KY	LA	MAINE	MD	MASS	MICH	MINN	MISS	MO	MONT	NEB	NEV	N.H.	N.J.	N.M.	N.Y.	N.C.	N.D.	OHIO	OKLA	ORE	PA	R.I.	S.C.	S.D.	TENN	TEXAS	UTAH	VT	VA	WASH	W.VA	WIS	WYO	U.S.	No. of Affirmative Responses	No. of Affirmative Responses as a % of Approved Practices
1. Written Rules Specifying Offenses	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	45	100%
2. Rules or Specific Sanctions Communicated to Offenders																																																						11	25%
3. Written Rules on Copy of Inmate Handbook																																																						44	98%
4. Inmate Receives Written Notice of Charges Before Hearing																																																						44	98%
5. Inmate Receives Prior Notice of Formal Hearing																																																						44	98%
6. Inmate Tape-Recorded Conduct of Hearing																																																						42	100%
7. Inmate Permitted Assistant for Hearing																																																						27	73%
8. Inmate Permitted Assistance from Counsel Substitute																																																						51	100%
9. Inmate Permitted Evidence																																																						52	100%
10. Inmate Permitted to Question Witnesses																																																						52	100%
11. Inmate Copy of Report Submitted																																																						29	56%
12. Impartial Decision Maker																																																						31	64%
13. Inmate May be Represented by Counsel																																																						28	57%
14. Inmate May be Represented by Counsel Substitute																																																						14	37%
15. Inmate May be Represented by Counsel Substitute																																																						39	89%
16. Decision Based Solely on Evidence at Hearing																																																						29	85%
17. Decision Rendered in Writing																																																						38	88%
18. Records Made of Hearing																																																						31	91%
19. Inmate May Appeal Decision																																																						44	98%
20. Inmate Notified of Appeal																																																						27	84%
21. Record Expunged if Guilt Not Established																																																						11	35%

1. Written Rules Specifying Offenses
2. Rules Provide Specific Sanctions for Specific Offenses
3. Inmate Receives Copy of Rules

The existence of a right to disciplinary hearings (and the procedures they involve) has been a primary focus of recent professional attention. But the disciplinary process begins with the promulgation of institutional rules and regulations. Our survey revealed that the states uniformly report compliance with the fundamental requirement that these rules be written. We also found that all jurisdictions, save one, claim to distribute these written materials to the inmates. However, only a quarter of the states with ascertained practices also give the inmates guidance regarding the santions which may be imposed for established violations of the rules.

A set of rules detailing the prescriptions and proscriptions of an inmate's daily routine gives him notice as to what constitutes undesirable conduct. This facilitates the avoidance of disciplinary problems. Conversely, the lack of such prior notice may contribute to an inmate's belief that disciplinary authority will be exercised arbitrarily, which may itself create or exacerbate disciplinary problems. Moreover, the absence of such rules would appear to violate the fundamental due process precept that it is unfair to hold a person responsible for his conduct without giving notice of the operative constraints. All of the 44 jurisdictions with ascertained practices have developed written rules.

Of course, the existence of some rules hardly constitutes an adequate response. Examination of the institutional rules which we collected indicates that while almost all of the states enumerate offenses for which an inmate may be punished, many of the listed infractions are so vague and indefinite that it is difficult to differentiate between what might be permissible conduct and what might constitute a violation. For example, in New York at the Attica Correctional Facility, "offensive and unhygienic acts and activities anywhere in the facility," "cheating," and "insolence" may subject an inmate to discipline. Other prohibited actions which are included in inmate rule books of various prisons are: "disrespect or lack of cooperation," "lying," and "miscellaneous offenses" (which is defined as "any infraction not specifically listed" in the Alabama institutional handbook where we found it). The existence of such overbroad or vague rules may lead to abuse of discretion on the part of the correctional officers. Further, the existence of such poorly drafted rules would seem to make the officer's job of detecting and reporting misconduct more difficult. At least three jurisdictions, Minnesota, South Carolina, and the District of Columbia, have addressed this problem by attempting to define each punishable offense listed in their rule books. This gives inmates clear prior notice of proscribed conduct. It will also make any hearing and review procedures more efficient by providing a focus for the presenta-

tion of evidence. The final advantage to clear rules lies in the ease with which they may be treated in training programs, as compared with general statements. (The McKay Commission, which investigated the Attica uprising, found that new officers "had almost as much difficulty as new inmates in ascertaining what the rules were." Attica 74 (Bantam ed. 1972).)

Another problem with the written disciplinary rules now in effect is that, unlike the statutory criminal law, a majority of the states' inmate rule books do not contain a breakdown of specific punishments provided for specific offenses. While all states mention some range of dispositions (e.g. counsel and reprimand, loss of privileges, segregation, loss of good time, and various combinations) only 25% of the states tie in or correlate specific punishments or ranges of punishments for each defined offense.

Therefore, except for limits on the duration of a punishment, in most states the disciplinary tribunals have virtually unfettered discretion regarding the imposition of penalties. As a consequence, an inmate in most states is left to suspect the worst. The absence of rules having a hierarchal ordering or stipulated dispositional range may lead to a suspicion that one is being arbitrarily dealt with, which contributes to unrest.

Our survey revealed 11 states which have tied punishments to offenses. In Alabama, for example, each offense has a specific, fixed punishment that may be imposed. In other jurisdictions, such as Minnesota and the District of Columbia, offenses are grouped together to form limited categories. Within relatively narrow boundaries, a range of penalties is listed for each of the categories. The penalties appear to be related to the nature of the violation, with what we deem to be the more severe offenses punished more severely.

We noted that many inmate handbooks do not include a description of the disciplinary procedures employed for handling rule violations. Even in those which did discuss procedure, the explanations were sometimes so imprecise or unclear as to be simply inadequate. Most states supplement these handbooks with administrative regulations that set forth the established procedures. However, these regulations are not uniformly distributed to the inmates. One common form of distribution has been the posting of the regulations somewhere in the facility. This method may well be inadequate. It would appear to be better procedure to include a fully informative description in the handbook and to have this recitation printed as part of, or distributed along with, the notice of charges which inmates are given.

4. Inmate Receives Written Notice of Charges Before Hearing
5. Inmate Receives Prior Notice of Time of Hearing
7. Continuance Allowed to Prepare Defense

The states appear to have widely recognized the significance of the pre-hearing period in the disciplinary process. Virtually without exception, an inmate accused of violating an institutional rule receives a written notice of the charge against him and he is advised when the hearing will be held. Frequently he can obtain a delay in the hearing if necessary to prepare a defense to the charges.

As is true in the criminal justice system, what happens before the disciplinary hearing may be more important in determining the outcome of the proceeding than the hearing itself. The period between the occurrence of an alleged offense and the hearing should be a time for preparing the best available defense to charges. Because confinement status, good time credits, parole eligibility and similar important interests may all be affected by the outcome of a disciplinary hearing, it is essential that an inmate accused of an intramural offense receive notice of the charge and the hearing date and that he have an opportunity to investigate the facts and prepare evidence in his own behalf.

Although our survey revealed a variety of procedures, most states initiate the disciplinary process with a disciplinary or incident report, which a staff member completes. Typically, the inmate named in the report receives a copy of it. This becomes his notice of the charges. In light of the observed vagueness and generality of many of the rules which may form the basis for a misconduct report, the clarity and completeness of the notice the inmate receives is crucial. Minnesota and Louisiana have two of the more complete notice forms. Each includes a specification of the regulation allegedly violated; the name of the reporting officer; the time, date and place of the incident; the names of the witnesses; a summary of the evidence regarding the violation; and the tentative hearing date. A number of states incorporate notice of the procedural rights of the accused inmate with the notice of the charges. Other states have this information in the inmate handbook; some have it posted in the institution. Regardless of the means employed, the inmate's attention should be drawn to this procedural information at this time.

As previously noted, many jurisdictions provide insufficient notice of the punishment which may be imposed upon establishment of a rules infraction. Since there is typically an option for a plea of "guilty" to the charges, states should explicitly indicate, along with the notice of the charges, the sanctions authorized or commonly imposed for the violation charged.

The states are almost uniform in providing that the hearing will take place within a few days of the alleged violation.

This appears to be salutary, because it means that the event will be fresh and sharp in the minds of the accused and the witnesses. Too great haste, however, may possibly work against the inmate and diminish his ability to mount a proper defense. This would be the case when the scheduled hearing date comes before the inmate, or his counsel or counsel-substitute, if allowed, has been able to complete the investigation on which his defense would be predicated. Of the 34 states with ascertained practices in this area, 27 or 79% make provision for a continuance. Some states, such as Colorado, allow a continuance at the discretion of the hearing body. Others, like Louisiana, Oregon, and Nevada grant one continuance as a matter of right. These continuances are often limited in time, such as a maximum of five days in the case of Louisiana, and one week in the case of Colorado.

In addition to time, the inmate also needs to have access to relevant evidence in order to prepare his defense. This can be done either by the inmate personally, or by his representative. South Carolina allows the inmate's representative to interview witnesses and other participants in the incident in order to present this information at the hearing. Alaska and Connecticut similarly provide for the representative to do whatever investigation is necessary to ready a defense for the hearing.

In most states, some prison official is called upon to determine the inmate's status during the pre-hearing period. Typically, administrative segregation is authorized when the inmate is considered to be a threat to himself, another inmate or a staff member, or when he constitutes a threat to the security of the institution. Some inmates have claimed that close pre-hearing confinement is routinely ordered. Although this is doubtless an exaggeration, anyone so confined needs more than just time to prepare a proper defense to disciplinary charges. In some 39 states the inmate may have the assistance of a counsel-substitute at his disciplinary hearing. Twelve of these, and two others as well, allow retained counsel. But, to be fully effective, this representative probably should be assigned to the inmate as soon as he is accused of an offense. This representative should be allowed to investigate the case in the inmate's behalf. Such an investigation should include the right to interview witnesses, including the reporting officer, and to examine any pertinent documentary evidence. Presumably, all the witnesses and evidence are within the institution, making a continuance of more than one week, if needed at all, seldom necessary. Early appointment of this representative would appear to be most important when the institutional disciplinary proceeding is going to be held in abeyance pending a determination by the appropriate prosecutorial officer whether to initiate criminal charges. Competent legal counsel, rather than a staff member or law student or another type of substitute, is necessary in these circumstances.

6. Impartial Tribunal Conducts Hearing

The importance of an unbiased fact-finder has been recognized by correctional authorities no less than in society at large. Indeed, all of the jurisdictions with an ascertained practice require that an impartial tribunal conduct the disciplinary hearings. For our survey, an impartial tribunal was defined as one on which the charging officer and any witness could not sit.

The most common practice seems to be the creation of a three member body which jointly exercises the decisional function. The board's composition usually is "one from security, one from treatment, one from administration." This last individual, usually an associate or deputy warden, is chairman. Several states appear to allow inmate participation on the board in a voting capacity with the consent of the accused inmate. Whether these measures do produce an "impartial" tribunal in fact is not clear.

Impartial literally means "not partial." Partial itself means "inclined to favor one party more than another." Definitionally, therefore, more is apparently required than disinterestedness in the particular case. But it is only this quality that the typical rules seem to address. If we look to the similarity of age, educational preparation, community and ethnic background, which mark correction officers, and add the factor of the shared work experience, then at least one member of the typical board may be "inclined" to favor a particular side. Since correctional bureaucracies have tended to be built from within, the representative of "administration" may have this same "tilt". Since staff and inmates rotate through various assignments over time, it is possible that members of the disciplinary board have previously encountered the accused inmate and they have developed fixed views about him. This latter bias problem can be alleviated by encouraging board members to withdraw from a case whenever they have developed such opinions. Since board membership is usually rotated among a number of staff members, qualified alternates should be readily available.

There is also the possibility that simple membership on the disciplinary board produces a biasing effect. Unless the need for impartiality is stressed (and agency regulations pay no more than formal obeisance to that objective) board members may misconceive their role and, consequently, not perceive that accuracy in fact-finding is a minimum requirement. Correctional workers believe they need to "back" each other. It is important that they leave this attitude at the hearing room door, if the goal of impartiality is to be attained.

Problems such as these have stimulated interest in developing means for attaining true impartiality. A variety of approaches have been proposed. They should be carefully examined

and implemented if they represent better solutions than we now have. It has been suggested, and several states have taken that path, that only relatively senior personnel sit on disciplinary boards. The underlying assumption of this approach is that this increases the chance of having board members who are capable of objectivity. Another possible solution to this problem is the inclusion of outsiders, such as lawyers, on these boards. This has been suggested, but not implemented, for Massachusetts. It appears that outsiders do hear the graver offenses committed in British prisons. So far as we are aware, however, the Baltimore City Jail is the only facility in this country where an outsider decides disciplinary matters. Because the practice is of recent vintage, there is as yet no verified information on the effect of the practice. Another approach might be to use probation or parole personnel on disciplinary boards. As correctional workers, such individuals might win acceptance by the line staff while maintaining a respectable distance from the possible skewing effect of the institution itself.

8. Inmate Personally Appears at Hearing
9. Inmate Hears Evidence
10. Inmate May Make Own Statement

All states recognize these fundamental rights. However, they were not always specifically set forth in inmate rule books. When this was the case, their existence was easily inferrable from the explicit granting of more controversial rights, such as cross-examination. Generally, we found that it was those states which deny the more controversial rights which made explicit reference to the right of appearance and allocution.

Most states probably recognize, but only a few so state, that the hearing body can take private testimony whenever it believes that revealing the identity of a witness would subject him to the possibility or threat of harm. This type of limitation on the right to hear the evidence was sanctioned in Morrissey v. Brewer.

A substantial number of states have made provision for the pre-hearing investigation of disciplinary charges. In these cases, a specially designated employee is responsible for verifying and supplementing the initial misconduct report. The investigating officer then reports on his findings to the disciplinary board. The board then may call witnesses or request additional investigation before reaching its decision. What the inmate usually hears in these states, therefore, is evidence once removed (i.e. hearsay.) Granted, the formal rules of evidence would probably be inappropriate at disciplinary proceedings. But the question remains whether this technique does not eliminate procedures for testing a witnesses' truthfulness and powers of observation without making an adequate replacement.

This "investigating officer" approach also injects a new element into the determination of the impartiality of those administering the disciplinary procedure. At the least, fairness would seem to require that the impartiality requirement should attach to the investigator as well as the tribunal, unless the accused inmate can insist as of right on hearing the direct evidence against him.

The materials we inspected were silent on the duty of the investigating officer to bring forward exculpatory as well as inculpatory information. This issue, as well as those raised above, certainly deserves consideration in future research.

None of the states express a limit on what the inmate may say in his own behalf. Doubtless, the hearing board can require the inmate to observe a reasonable durational limit. Considerations of relevance and materiality may also operate to limit an inmate's statement. As previously noted, only 11 states give effective information about the potential consequences of a finding of guilt. This tends to reduce the usefulness of the opportunity to speak, since the inmate cannot really argue in mitigation of punishment if he doesn't know what it may be. Many inmates are inarticulate, and this would further diminish their ability to make use of the right to make their own statement.

11. Inmate May Call Relevant Witnesses

There are some 29 states which provide that inmates may call witnesses in their own behalf at disciplinary hearings. (Missouri, although not specifically stating that witnesses can be called, indicates that an inmate may present information available to him and others to the board. Arguably, therefore, it is a 30th state in this category.) In a few additional impartial states, such as Illinois and Ohio, the inmate can request that the tribunal interview certain witnesses, and in the discretion of the board the requests may be granted. In most of those states it appears that the board ordinarily complies with such requests unless it feels that the testimony will be totally irrelevant to the proceedings.

However, in almost all of the states that permit witnesses for the inmate, certain limitations are imposed by the rules. These usually center around the number of witnesses that may be called. For example, Delaware allows the inmate the right to call five witnesses in his behalf, after which the board has the discretion to permit more. In Minnesota, the limit is three witnesses, while in the District of Columbia, the limit is two. Most other states do not specify any fixed limitation on the number of witnesses, but usually reserve to the board the option of denying certain testimony that it feels is merely cumulative or repetitive. Two states, Nevada and Wisconsin, limit the

witnesses to individuals who have personal knowledge of the allegations.

Affording the inmates the right to call witnesses in their own behalf is an important corollary to the right to make one's own statement. Where an inmate's self-interest is at stake, the observations of such third parties may even be a preferable means of "getting the facts out," since the credibility of a third party may exceed that of the accused. (The fact of the witness' prior conviction may give grounds for attacking his veracity, but it does not eliminate it.) The hearing boards of course, have the discretionary authority to control the number of witnesses they will hear. If those powers are not abused through overuse of "irrelevant" and "repetitious" testimony limitations, the minimum basis for factual determinations will exist.

12. Inmate May Confront Adverse Witness
13. Cross Examination of Adverse Witnesses Allowed

The right to confront accusing witnesses and to subject their testimony to cross-examination apparently are among the most controversial procedures the states have examined for applicability to the disciplinary hearing. Nearly as many states deny these rights as grant them; only three or four states lack clear policies. Twenty eight states (53% of all the jurisdictions in our survey) permit both of these procedures. Three additional states permit confrontation but not cross-examination. (For purposes of the survey we did not classify as an affirmative response the following practices: (i) the hearing board conducts the cross-examination based on questions submitted by the accused inmate; (ii) the calling of adverse witnesses and their cross-examination is totally discretionary with the board; and (iii) the presentation of evidence by an investigating officer rather than witness.)

The implementation of these rights in the various jurisdictions falls into a few separate categories. First, there is the procedure employed by a few states, of which Arizona and South Carolina are typical, where an inmate is permitted to cross-examine his accuser only through his representative. For example, in Arizona, the inmate is entitled to hear all witnesses against him, and his counsel is entitled to examine such witnesses. However, if the prisoner is representing himself or is represented by another prisoner, he presents his questions through a staff member designated by the disciplinary committee. In Tennessee, another state in this group, cross-examination can only be done by and through a "resident advisor" (who is a lawyer representing prisoners at disciplinary hearings on a full time basis.)

A second group of states stipulate that the right to confrontation and cross-examination is afforded only when the possible penalty is of a "grievous" nature. In Delaware, for ex-

ample, "grievous loss" is defined as the possible imposition of more than five days in solitary confinement or the loss of five days' good time. Hawaii permits confrontation and cross-examination when the prisoner is threatened with placement in solitary confinement for an indefinite period. Other states having such limitations are Maryland, Nevada, and South Dakota. Each sets forth its own definition of "grievous loss." Maine may also be in this category. It allows a substantial number of procedural safeguards to come into play, including confrontation and cross-examination, when the offense allegedly committed by the inmate constitutes a crime under the laws of Maine or of the United States.

While the remainder of the 28 states allowing cross-examination do not impose such restrictions on the procedure, most states, including those mentioned above (e.g. South Dakota, North Dakota, Virginia, District of Columbia), do restrict confrontation and cross-examination for "good cause". This most commonly applies when non-disclosure of the identity of a witness is necessary to protect him. For example, in the District of Columbia the prisoner has the right to confront and cross-examine an informant unless the board finds in a particular case that disclosing the informant's identity would pose a threat to his physical health or safety. If cross-examination becomes inflammatory at a disciplinary hearing in Maryland, the hearing officer may conduct the examination himself.

The three states which allow confrontation but not cross-examination are Alabama, Ohio and Pennsylvania. In Ohio, the inmate may only question his accuser by submitting questions to the chairman of the hearing board.

The practice in New Mexico is illustrative of procedures which we did not consider to present an opportunity for meaningful confrontation and cross-examination. There, a hearing officer functioning as an impartial agent investigates and reports on all alleged facts concerning the rule infraction, including interviewing both the inmate and his accuser. At the disciplinary hearing this agent may be questioned by the inmate or his counsel as to the facts he found. However, no inmate or inmate's counsel may directly confront correctional officers or witnesses before the board. As a result, it is only the agent's power of recollection which may be tested, not the credibility or powers of observation of the actual witnesses.

Despite such shortcomings, a majority of states do recognize that confrontation and cross-examination of witnesses are essential ingredients of disciplinary hearings. They appear to realize that when facts are in dispute it is imperative that the accused be allowed these procedural safeguards. Cross-examination has a venerable history and is accepted as one of the most important devices known for ferreting out the truth.

Many of the recent cases dealing with the issue of what constitutes due process and "fairness" in prison disciplinary hearings recognize confrontation and cross-examination as critical to the proceedings when the interests of the inmate involved are substantial. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569 (E.D. Penn. 1972). Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Inmate 24394 v. Schoen, 363 F. Supp. 683 (D. Miss. 1973). Rule infractions usually become an indelible part of an inmate's institutional record and, apart from the imposition of any direct penalty, may also influence parole consideration. Even if such direct sanctions as the temporary loss of some privileges are not substantial, surely denial of parole and the consequent longer term in confinement would meet the test.

Many correctional officers vociferously resist the notion of inmate questioning guard. They believe this undermines the relationship on which good institutional order must rest. However, the experience of jurisdictions granting the cross-examination right does not support this belief. This is clear from the material collected recently by the Attorney General of New Jersey in connection with Avant v. Clifford. (See Appendix B for the state's interpretation of this material.)

Many of the 43 responding states indicated that since their procedures had been adopted quite recently, it was difficult to ascertain and evaluate the consequences of their implementation. Fifteen states did express an opinion, however. Fourteen of these states indicated that permitting confrontation and cross-examination had no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been "upgraded" and that some of the inmate feelings of powerlessness and frustration had been relieved. In a letter dated December 13, 1973, Assistant Attorney General John Henry Brown of Washington, indicated that although new disciplinary procedures initially met with some staff resistance, most inmates and a sizeable number of correctional staff now feel the new procedures to be "fairer." Tennessee Assistant Attorney General W. Henry Haile, stated in a letter dated December 10, 1973 that:

> The rules have not had a noticeable effect on inmate disciplinary problems. Nor has cross-examination had any effect on prison security (and) order...On the whole our experience with cross-examination...has been good and the inmates seem to think they get a fair shake before the disciplinary board, and our statistics indicate this is true.

Some of the critics of "due process" hearings assert that the result of new procedures will be fewer violation reports initiated by staff. Generally, the attorneys general did not find

a decline in the number of rule violations reported, although some states indicated that there was an initial decrease when the new procedures were instituted. However, once staff realized that these procedures were not destructive of the prison system, the number of reports increased to previous levels.

Only the reply from New Hampshire voiced displeasure and concern with confrontation and cross-examination. However, the letter dated January 9, 1974 from Assistant Attorney General, David W. Hess, indicated that this was largely due to starting-up difficulties which "slowed down the disciplinary process and consumed an inordinate amount of time on the part of prison officials and administrators."

14. Inmate May Be Represented by Counsel
15. Inmate May Be Represented by Counsel-Substitute

A total of 41 states allow an accused inmate to have counsel or counsel-substitute at disciplinary hearings. In 39 states (89% of those with an ascertained policy), representation is limited to counsel-substitute. But a growing number, now 14, allow retained counsel, and, in certain circumstances, even appoint an attorney to represent the accused.

The details of these plans vary from state to state. In Connecticut, the inmate chooses his representative from a list of staff members who have volunteered to assist inmates at disciplinary hearings. He puts down his top three choices and is assigned his highest choice who is available. New York automatically appoints an employee to act as counsel, while Oklahoma allows representation by either an employee or another inmate when the accused is incapable of presenting his own case. Several states allow for an inmate representative but, significantly, limit his potential effectiveness by prohibiting him from cross-examining accusing staff members.

Over a third of the states with stated policies on the matter allow inmates to retain counsel for disciplinary hearings. Arizona states that an inmate may be represented by an attorney at any disciplinary hearing-provided that he bears the cost. If he cannot do so, he is entitled to have a staff member or another inmate act as his representative. Kansas and Delaware, in addition to allowing retained counsel or counsel-substitutes, appoint counsel whenever a disciplinary proceeding involves behavior which also constitutes a criminal offense.

Most states now recognize that an inmate needs some sort of aid to adequately present his case to the disciplinary board. This becomes more obvious as the disciplinary procedures become more and more complicated with multiple levels of operations and options. The need for a spokesman is underscored by the fact that many inmates are inarticulate.

The same factors which support the need for some form of assistance at disciplinary hearings--their growing complexity, the severity of the possible sanctions, etc.--suggest some potential weaknesses in the counsel-substitute approach to meeting the need. In order for any such program to be successful, it is essential that the accused have confidence in his representative and that the representative have the requisite skill and independence to properly represent his client's interests. A program which limits representation to staff members or fellow inmates may be open to the criticism that the accused inmate doesn't get the effective assistance that seems to be promised.

The inmate should be given as broad a choice as possible in selecting his representative. Because this person is supposed to help the accused, the inmate should be allowed to choose among willing staff members, inmates or other responsible persons. One problem with limiting representation to staff members or inmates is the possibility of pressures from prison administrators or staff members. The staff advocate who successfully cross-examines the reporting officer or succeeds in winning a dismissal of the charges may find himself ostracized by his fellow employees. Similarly, an inmate advocate may jeopardize his parole release by a too vigorous defense of his "client." These pressures may reduce the effectiveness of such representatives.

A second problem with using lay advocates is that they may be unfamiliar with the disciplinary procedures or how to effectively represent the accused. An effective representation program should include a training program on the procedures in force and the techniques of representation. (This is not to suggest that lawyers automatically will be effective advocates or that all lawyers are knowledgeable concerning disciplinary procedures. However, disciplinary procedures are sufficiently similar to others with which counsel will be familiar as to generate an expectation that the new field can be assimilated or learned without much difficulty. Correctional workers may object that outside lawyers don't understand the "realities" of institutional life. However, that lack of understanding may indeed be a major benefit since it could lead to the raising of important questions which "insiders" are inclined to avoid.) Whenever complex cases arise, the lay representatice should have an attorney with whom he can consult.

There are several ways in which these problems can be resolved. One possibility is to use law students as advocates. This avoids the potential conflict of interest problem, which is inherent in staff representation of an inmate before a staff tribunal, and minimizes scheduling conflicts which arise when employees act as representatives. Law students may require less training (although they will certainly require some) than staff members or inmate representatives and can often be supervised through law school faculty members. The District of

Columbia now uses such a program at Lorton Correctional Complex.

Those inmates who are able to provide their own attorneys should be allowed to do so. Not only would this free staff for other duties, but a trained attorney should be able to quickly narrow the issues and avoid needless repetition and irrelevancies. As previously noted, 14 states already allow the use of retained counsel. In addition, a number of courts have recognized the right to retained counsel. See Palmigiano v. Baxter, 487 F. 2d 1280 (1st Cir. 1973); Pearson v. Townsend, 362 F. Supp. 207 (D.S.C. 1973); Inmate 24394 v. Schoen, 363 F. Supp. 683 (D. Minn. 1973). Without a doubt, the major obstacles to the universal provision of counsel for disciplinary hearings are practical. Whether there are enough lawyers to handle the volume of hearings, or whether there is enough money to pay them, are important issues. There is scant empirical evidence on which to base conclusions.

A special situation arises when the disciplinary offense charged is also a criminal violation. The inmate is placed in the particularly precarious position of attempting to defend himself against disciplinary charges while preserving his rights in the criminal proceeding. (Indeed, in this situation the National Advisory Commission on Criminal Justice Standards and Goals has recommended deferring the disciplinary hearing. Report on Corrections, Standard 2.11.) In such cases it is essential that he have the assistance of counsel. See Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973) and Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). Other appropriate instances for appointed counsel include those cases where the issues are very complex or when there are substantial mitigating circumstances, Gagnon v. Scarpelli, 411 U.S. 718 (1973).

16. Decision Based Solely on Evidence at Hearing
17. Decision Rendered in Writing

At least 14 states fail to explicitly require that disciplinary hearing decisions be rendered in writing. And 23 articulate no requirement that the decision must conform to the evidence presented at the hearing.

It is somewhat difficult to determine from an examination of prison rule books whether policy requires that institutional disciplinary decisions be based solely on evidence presented at the hearing or if other factors may be considered as well. Only 34 states directly address this issue. Of these, 29 states require a decision based solely on the evidence presented, while five allow other factors to be taken into account.

It would seem that there is ample relevant and material evidence for disciplinary boards to consider and that, therefore, the tribunal should, in the interest of fairness, be

limited to that data. Even in the most rudimentary situations, there will be a staff member's report, the inmate's response and explanation of his behavior, and physical evidence, (unless the charge is "insolence," "abusive language," or similar offenses attacking attitudes or speech.) In more elaborate circumstances, where counsel, counsel-substitute, confrontation and cross-examination may have been provided, there will also be testimony disclosing credibility or observation problems and the like. Such things as the inmate's attitude or parole date, his past behavior, staff members' impressions, or file materials containing information as to the number and nature of previous charges against the inmate should not be considered because they do not bear on the present charge.

These extraneous matters often creep in. The closed nature of the prison environment renders the "decision-based-solely-on-evidence-presented" objective virtually unattainable absent more specific safeguards. Most prisons provide for the appointment of the hearing body from members of the prison staff. This makes it likely that one or more disciplinary committee members will know the prisoner and/or have seen his file already. Impressions of the inmate's general attitude and previous incidents, good or bad, may thus unavoidably infiltrate the decision-making process. It may be just such problems which prevent states from seeking to achieve this standard.

What happens where this limitation is not in force? New York is one of the states which permits the consideration of evidence which does not bear on the present charge. It attaches a broader purpose to the disciplinary hearing than just punishment for a wrongful act:

> Adjustment Committee Action (b). The action taken by the committee shall be based upon its evaluation of the inmate's attitude and his overall adjustment to the discipline and order that must be maintained in the facility, as well as upon the committee's evaluation of the facts and circumstances of the particular incident described in the report or slip. The committee shall not be required to make a finding as to whether or not the inmate violated any particular rule or regulation and shall not direct the action it takes toward the objective of imposing punishment for a violation. The action taken by the committee shall be focused upon the need for maintaining discipline and order within the facility and the degree to which the inmate has been and it cooperating with that need.

Vermont has an approach similar to the "point system" used in traffic law enforcement. It provides for the written "reprimand" of inmates. This results in no action until three or more are accumulated during a four month period. If an infraction is deemed serious enough for consideration by the disciplinary committee by an investigating officer, its ultimate written finding

of the facts will include:

> Evaluation of evidence and rationale for the decision that reflects a consideration of all the evidence and your previous record of conduct in the Facility during your current sentence.

The "previous record" is apparently documented at least in part by written reprimands.

Procedures for prison disciplinary hearings should protect against the arbitrary and capricious exercise of power by prison officials. A requirement that disciplinary committee decisions be based solely on evidence presented at the hearing is basic to achieving that purpose. Without that safeguard, an inmate may be subjected to suffer "grievous loss," including a loss of privileges, a loss of "good time" or confinement in solitary quarters because of his "attitude" or other intangible circumstances. A written decision containing a clear, articulated rationale stated in terms of the evidence would appear to be essential to assure that the decision is, in fact, based on the available evidence.

There are currently 38 states which require a written decision. The prescribed contents vary widely. Some states require that the decision include a complete report of the initial incident, a summary of the evidence presented at the hearing, the actual decision, and the reasons for that decision. Other states simply give the inmate a written verdict.

It is interesting to note that the written decision requirement usually appears along with a right to appeal. Although the correlation is not perfect, it seems a frequent enough occurrence to indicate, along with language from rule books, that the written decisions are regarded as the basis of appellate review. The appeal body has simply to look at the written decision and make a determination as to whether or not the decision is just. Without a requirement that the initial hearing body's decision be based upon evidence presented, however, the written decision, even with a summary of evidence and a rationale, may not adequately serve the goal of fairness. In that case, any material from the inmate's files, his past difficulties or simply the infraction report alone would serve to support the "justness" of a decision. Only by requiring both that a decision be written and that it be supported by evidence presented can decisions based on personal, unarticulable feelings rather than on facts, be prevented.

18. Records Made of Hearing
19. Inmate May Appeal Decision
20. Inmate Notified of Appeal
21. Record Expunged if Guilt Not Established

States quite commonly make a record of disciplinary proceedings and allow an appeal from adverse decisions. Surprisingly, the inmate is not always advised of this appeal possibility where it exists. Only a few states appear to expunge the inmate's record when the disciplinary hearing outcome is favorable to him.

The verbatim transcript is the traditional device for preserving the record of criminal and administrative proceedings. A record of the proceedings facilitates the taking of an appeal and it also makes both sides more conscious of observing the procedural rules in force so as not to undermine their case on appeal.

For our study, a record of the proceedings includes not only a verbatim transcript but also a tape recording of the proceedings, or in the alternative, a complete summary of the evidence and findings of the board. Using this definition, over 90 percent of the jurisdictions which discuss the subject make some form of record of disciplinary proceedings.

There are various methods in use by 38 states. Ohio specifies that the testimony of each witness and the inmate shall be electronically recorded and preserved for three years. Arizona specifies that the hearings are to be recorded by a mechanical transcription device as well as having the disciplinary board prepare a summary or minutes of the cases heard. Vermont requires a written finding of facts including the charges, a summary of the proceedings and evidence presented, an evaluation of the evidence, and a rationale for the decision.

Obviously, the more complete the record, the more valuable it becomes on appeal. If a case is appealed with nothing more than the initial violation report and decision of the hearing board, the person considering the appeal does not have an adequate basis for his review. He is faced with a choice of either holding a de novo hearing or rubber-stamping the decision of the board.

There are also some problems with a record that merely consists of a summary of the evidence. The board may either inadvertently or intentionally omit important evidence or interchanges in its summary. If the inmate complains about one of these interchanges, the person hearing the appeal has no way to know whether the complaint is valid.

The best solution to the problem of preserving an adequate record may be in tape recording the entire proceeding. The tape can be preserved for a sufficient time for the appeal of adverse

decisions. This solution has the advantages that it is cheap to operate (after an initial capital investment), it is capable of being operated by a member of the board who must be present anyway, and it preserves the record for appeal. This was the method suggested by the court in Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973).

The opportunity of appeal serves several purposes. The appeal has been used in the criminal justice and administrative settings to correct mistakes made by the justice or hearing examiner at the initial level. It offers a way to invoke the greater impartiality that review by a disinterested person can often provide. These same considerations apply in the correctional setting. In addition, the review by a higher level official may allow identification of trouble spots in the system, and permit corrective action. The review will also let him make the punishments imposed by the hearing boards more uniform in those cases in which more than one board is in operation. Forty-four states provide at least one appeal as of right.

Equally important as the right to appeal an adverse decision is notice of that right. Many people involved in the criminal justice system are unaware that they have such a right. It is obvious that a large number of those inmates found guilty of rule violations will likewise be unaware of the appeals process if they are not so informed. But only 27 states give notice of the appeal right. Fortunately, this shortcoming can be easily overcome.

Perhaps the simplest form of appeal in use today is the automatic review of all hearing board decisions. Florida and Oklahoma both use this procedure. In Oklahoma, a Review Committee composed of members of the institutional staff who do not sit on the disciplinary board review all cases involving loss of good time or confinement to maximum security. The Committee can confirm the decision of the board or reduce the penalty. But it cannot increase the punishment. The warden reviews all the decisions of the disciplinary board and the Review Committee. He can similarly uphold or reduce the penalties imposed, but may not increase them.

Rhode Island provides that if an inmate is found guilty, he is then informed of his right to appeal the decision to the warden or acting warden. Following an adverse decision of the board, an inmate has 36 hours in which to file a notice of appeal stating his reasons for the appeal. The tape recording of the proceeding is then forwarded to the warden or acting warden who can decide to uphold the disciplinary board decision, reduce or suspend their decision, or order further proceedings. The rules also provide that the inmate can be assisted in his appeal by his classification counselor.

Indiana allows the inmate two levels of appeal. First, he has the right to appeal adverse decisions to the head of the institution. If he is dissatisfied with this decision, he can appeal to the head of the correctional system or his designate. Once again, the reviewer has no authority to increase the punishment.

At this point in time then, the states seem to agree that inclusion of some form of appeal procedure in the disciplinary process is a necessity. This is bolstered by a number of court decisions. See Palmigiano v. Baxter, 487 F. 2d. 1280 (1st Cir. 1973), Pearson v. Townsend, 362 F. Supp. 207 (D.S.C. 1973), and Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973). The main questions remaining are: How should the appellate procedure operate and what can be done to make it more effective?

One of the primary things which can and should be done is to have a complete record of the disciplinary hearing. This can easily be accomplished by a tape recording. A complete record of the proceedings allows the reviewer to quickly determine whether or not there are grounds for the appeal. It also decreases the chances that further hearings will be necessary.

Second, the inmate should be aided in his appeal by the same representative who helped in the hearing. The representative will be able to pinpoint those areas which require attention. This provides the inmate with a more effective appeal and again saves the reviewer the time of wading through a mass of data or considering inarticulate or spurious arguments.

Third, the reviewer should occupy a position where he does not have excessive contact with any of the participants in the hearing. This is necessary to insure his impartiality. Consideration should be given to appointment of someone not connected with the institution as the reviewer, such as a civilian review board. Otherwise, review should be by the head of the institution.

Finally, the reviewer should have the authority to override the recommendations of the disciplinary board. This should include reversing their decision, lowering the punishment, suspending sentence, or ordering further hearings. He should not, however, be allowed to increase the punishment since this would tend to inhibit appeals and might engender dissatisfaction among the inmates.

Apparently, few states have faced the issue of expungement of inmate records when guilt is not established. But this is every bit as important to the inmate as how the hearing board makes its decision. An inmate's disciplinary record has a major effect on his life in the institution and his ultimate release date. Classification, work assignment, privileges and parole eligibility are all influenced by it. Therefore, it is essential

that when the disciplinary committee dismisses a charge against an inmate or rules in his favor, the violation report should be removed from the inmate's file.

At present, most states place a copy of a violation report in the inmate's file regardless of the outcome of the case. Even when a notation is made that the case has been dismissed or the inmate has been found innocent by the board, these reports come to the attention of anyone subsequently reviewing the file. There can be no adequate assurance that the prior charges do not influence the decision-making process.

Eleven states, including Arizona, Michigan, Oregon and Utah, recognize this danger and now prohibit any mention of a report being placed in the inmate's file if charges are subsequently dropped. This procedure is similar to expunging arrest records of people who are subsequently acquitted of charges or who have their cases dismissed.

IV. CONCLUSIONS AND IMPLICATIONS

A variegated and contradictory picture emerges from the data presented above. On the one hand, there is the numerical side of the prison disciplinary process. Half of the procedures which prisoners want applied to the disciplinary process (and to which their lawyers and many courts believe they are entitled) are in effect in 90% of the state's whose practices were ascertainable. Only three practices are not in force in at least half of the states. We sought to identify 1100 discrete bits of information about prison discipline systems. Fully 2/3rds of the possible answers were in the affirmative--the procedure is available. By the numbers then, inmates facing charges arising out of prison misconduct are granted substantial procedural safeguards before, during, and after the determination of responsibility.

But the numbers only reveal part of the picture. They do not disclose that the procedures which are least often available include those which may have the most value to the accused. Nor do they disclose some of the limitations which apply to the procedures which are most frequently available.

An understanding of these qualifications is essential to keeping the numbers from becoming an obscuring veil.

Perhaps the pre-eminent qualification is that the shape of the disciplinary system is shifting. The procedures which the states presently employ are subject to continuing change. The direction of movement at present is toward more procedural safeguards. Many factors, including judicial decisions and the recommendations of national study groups, contribute to this flow. But, except in those relatively few jurisdictions where a statute or court order commands a certain practice, inmates may in no sense be said to have a right to the safeguards they are now afforded. Corrections departments even shy away from the word "right," in favor of "privilege." It would appear to be essential to find and fix at least the rationale for determining the irreducible minimum procedures.

This inclination to maintain and exercise complete control appears to be in derogation of the case law which holds that right-privilege labelling is not dispositive of whether procedural safeguards should or should not apply to administrative determinations. The modern view is to begin analyzing these problems with a measurement of the impact on the individual. If that impact is so substantial as to constitute "grievous loss", procedural protections appropriate to the circumstances are required under the Due Process Clause. In our view, the graver sanctions available to the prison authorities do cross the "grievous loss" threshold. In particular, the loss of good time and confinement in punitive segregation have that quality. The loss of good time directly delays a prisoner's return to liberty. Segregation

is grave because in the severely limited freedom of a prison, each further restriction is magnified in its impact on the individual.

The purpose to the safeguards which become applicable is not the prevention of the loss which the individual faces. It is simply to assure that the loss is imposed only in appropriate circumstances. Leaving aside for advocates the question whether any but the least restrictive alternative sanction should be imposed, no loss should be inflicted on one who did not break the rules.

All states use a variety of techniques for bringing out the facts surrounding alleged misconduct. In every state the inmate may give his version of an incident, so the decision-maker will have facts available to him in addition to the misconduct report or other document which initiated the process. But the decision-maker--typically a three member board--must be disposed to consider everything which is available.

The Harvard Center for Criminal Justice initiated a seminal study of the actual workings of in-prison disciplinary hearings in 1970. The Rhode Island Adult Correctional Institution (ACI) was the study's subject. See Harvard Center for Criminal Justice, Judicial Intervention in Prison Discipline, 63 J. Crim. L. Crim. & P.S. 200 (1972). They found that the supposedly impartial disciplinary board composed of ACI employees often made decisions "on the basis of the personal and usually inarticulated feelings of a staff member, rather than on facts presented at the hearing." Id, 210. They concluded that a "back up your officers, whether they are right or wrong" attitude may have pervaded the Board. Id. No later research at the ACI, or elsewhere, has disputed the apparent conclusion that impartiality is an unattainable objective of the staff board. The materials we inspected two years after publication of the Harvard research do not reveal that protective devices have been developed to avoid this problem.

One approach which is obvious, at least to lawyers, is to give the prisoner an advocate who can assist him before the board, to make some record of the proceedings, and to make it necessary for the decision to be based on the facts which are adduced at the hearing. Forty-one different states permit an advocate of some sort (39 authorize only counsel-substitute; 14 permit lawyers.) But there is little specificity in the rules about the role of this individual. The epitome of this can be seen in the fact that 13 states which permit advocates do not permit cross-examination of adverse witnesses. Alternative means of uncovering possibly false, misleading, or biased evidence would appear necessary. But the states rest their faith in their "impartial" hearing body.

Over a third of the states did not indicate whether the disciplinary decision had to conform to the evidence at the hearing, and five more states plainly consider other matters.

An advocate of any stripe would have a hard time making a proper defense in these circumstances. An unaided inmate--and we find him in six of those states--must find his burden impossible indeed.

These findings underscore, dramatically we believe, the urgent need for further, more detailed attention to the disciplinary process, including the indirect as well as the direct implications of various procedures. At this point in time we are on shaky ground indeed with assertions that this procedure or that would be destructive of institutional order or similar complaints which may be raised. In truth we just don't know. Such reactions as have been collected about particular practtices (see, e.g., Appendix B) build no foundation for these claims.

An economic argument is also raised against suggested refinements in disciplinary procedures. "They would cost too much." But we are not told how much more and hence, we cannot fully evaluate alternatives. For example, we don't know what the cost of counsel for disciplinary hearings might be. Would that cost, whatever it might be, produce equal or greater benefit than competing uses for those funds? On a macro-scale, is a fair disciplinary system which is confined to the institutional level, more or less costly (or more or less valuable in correctional terms) than a system which encourages frequent resort to courts to redress alleged errors or injustices of an inadequate administrative mechanism? For that question, too, we have no answer.

If these, and the other objections to effective safeguards for accused inmates are not more substantial than they seem from the evidence and argument thus far put forward in their support, they should be rejected as improper barriers to individual rights.

APPENDIX A - CORRECTIONS DEPARTMENT MATERIALS

Alabama
Handbook of Rules and Information Governing Inmates Committed to Alabama Penal Institutions (Revised 4/73)

Alaska
Manual for Alaska State Adult Correctional Institutions (Revised 8/72)

Arizona
Inmate Reference Manual
Employee Reference Manual
Mail Regulations
Prisoner Rules, Regulations and Disciplinary Program of the Arizona State Prison (July 1973)

Arkansas
Inmate Handbook (Revised 11/72; currently being revised)

California
Rules and Regulations of the Director of Corrections (Revised 1
Rules and Regulations of the Director of Corrections (Jan., 197

Colorado
Dept. of Institutions (Penitentiary Canon City, Colorado)
Inmate Rules and Regulations (June 1973)

Connecticut
Inmate Handbook of Regulations
Handbook of Regulations - Connecticut Correctional Institute Chesire Rules
Rules of CCI, Niantic
Administrative Disciplinary Procedures (9/1/72)

Delaware
Inmate Reference Manual (2/73)
Rules for the Treatment of Inmates in Delaware Correctional Institutions

District of Columbia
Prison Disciplinary Procedures and Code of Prison Offenses (Dec., 1973)

Florida
Inmate Treatment Directive (June 1972)

Georgia
Rules of State Board of Corrections Institutional Operations - Chapter 125-2-5 amended (Oct. 1971)

Hawaii
Rules for the Dept.'s Operations Corrections Division (Revised 1971 - needs further revision)
Administrative Regulations (10/73)

Idaho
Rules and Information for Inmates (7/72)
Administrative Regulations (Revised 2/72)

Illinois
Residents Guide and Rule Book - Pontiac Branch
Administrative Regulations - sec. 804
Employee's Handbook - Pontiac Branch

Indiana
The Inmate Handbook - Indiana State Prison (Oct., 1973)
The Inside Story - Indiana Reformatory

Iowa
Resident Information Guide at the Men's Reformatory - Anamora, Iowa (also applicable at Ft. Madison), (January, 1973)
Policy and Procedure Guidelines: Disciplinary Procedure for all Correctional Institutions (6/73)

Kansas
Policy, Guidelines and Inmate Disciplinary Procedures (8/1/72)
Rules and Regulations of the Director of Penal Institutions (July, 1968)

Kentucky
Administrative Regulations
Resident Guidelines - Kentucky State Penitentiary Eddyville (1973)
Resident Guidebook - Kentucky State Reformatory

Louisiana
General Rules and Regulations - Louisiana Correctional and Industrial School; DeQuincy, Louisiana
Inmate Rules and Rwgulations - Louisiana State Penitentiary Unit of the Dept. of Corrections; Angola, Louisiana (January, 1973)
Inmate Rules and Regulations Department of Corrections (9/71)

Maine
Maine State Prison Officers Rules and Regulations (11/72)
Maine State Prison Rules and Regulations

Maryland
A General Rules of Conduct Handbook for Inmates - Hagerstown (January, 1973)
A General Information and Guidance Manual for Inmates (June, 1973).
Maryland House of Corrections - Jessup (1972)

Massachusetts
Massachusetts Correctional Institute - Pre-Release Center Boston
Administrative Regulations Regarding Disciplinary hearing (June 5, 1972)

Michigan
State Prison of Southern Michigan (Oct., 1971)
State House of Correction and Pranch Prison - Marquette (July, 1972)
Michigan Training Unit - Iona (January, 1973)
Corrections Camp Program - Grass Lake (May, 1973)
Michigan Reformatory (Nov., 1972)

Minnesota
Minnesota State Prison and State Reformatory for Men - Inmate Disciplinary Plan (Oct., 1973)
Inmate Handbook (Feb., 1972)
Agreement System - Disciplinary Unit (Jan., 1974)

Mississippi
Administrative Regulations -(November 30, 1973)

Missouri
Missouri State Penitentiary Inmate Informational Pamphlet (Apr.
Treatment Handbook - Missouri Training Center for Men, Moberly (Jan., 1971)
Personnel Informational Pamphlet (April, 1971)

Montana
Policy and Procedure Memo No. 7 (Oct. 13, 1972)

Nebraska
Administrative Regulations (Oct., 1973)
Regulations and Policies Nebraska Penal and Correctional Complex (3/73)
Guidance Manual Nebraska Penal Correctional Complex (3/73)

Nevada
Rules and Regulations of Nevada State Prison (Revised 11/71; currently being revised)
Rules pursuant to court order issued November, 1972

New Hampshire

New Jersey
Advice to Boys From One Who Knows (Revised 3/73)
Inmate Rule Book - New Jersey State Prison (March, 1973)
Handbook of Information for New Men - Youth Correctional Institute, Bordentown (June, 1972)
Administrative Regulations (1/72)

New Mexico
Dept. of Corrections for the New Mexico Penitentiary: Procedures, Rules and Regulations of the Classification, Adjustment, Segregation and Grievance Committee (Dec. 14, 1972)

New York
Administrative Rules and Regulations, chapters five and six.
Inmate Rule Guide - Attica (Revised 8/73)
Rules of the Manhattan House of Detention for Men

North Carolina
Department of Regulations, Article Four, Secs. 2-401 to 2-410 (June 1, 1972)

North Dakota

Ohio
Handbook of Information and Regulations - Chillicothe Correction Intitute
Administrative Regulations

klahoma
Manual for the Guidance of Inmates
Policy Statement: Disciplinary Procedures (Aug., 1972)

regon
Administrative Rules (Nov. 11, 1973)

ennsylvania
State Regional Correctional Facility at Greenburg (June, 1973)

hode Island
Regulations - Adult Correctional Institutions (Manual being compiled)

outh Carolina
Inmade Guide (revised 1972)

outh Dakota

ennessee
Department of Corrections, Disciplinary Procedures (Oct., 1973)
Rules for Inmates

exas
Rules and Regulations (7/9/73) with amendments (Nov. 12, 1973, Jan. 14, 1974)

tah
Utah State Prison Rules and Regulations
Disciplinary Procedures (Dec. 15, 1973)

ermont
Inmate Guidebook
State Statute pertaining to disciplinary hearings (28 V.S.A. 852) and Administrative Regulations for Disciplinary Hearings (Dec. 1, 1973)

irginia
Rules and Regulations for Inmate Discipline and Classification (April, 1973)
Division Guidelines for Correctional Personnel (June 1, 1973)

ashington
Disciplinary Procedures (May 1, 1973) per consent order

est Virginia
Rules and Regulations - West Virginia State Penitentiary

isconsin
Rules and Information Handbook - Wisconsin State Prison, Waupun (Sept. 1972)
Handbook of Information and Regulations - Wisconsin State Reformatory (Nov., 1972)
Wisconsin Division of Corrections Manual of Adult Institution Procedures (Rev. Oct., 1967)
Disciplinary Procedings Manual (Dec., 1972)

Wyoming

Inmate Rules and Regulations - Wyoming State Penitentiary (July, 1970)

Rules and Regulations for Employees (Oct., 1967)

United States

Bureau of Prisons - Policy Statement. Subject: Inmate Discipline. R. Gerard, Instiutional Services (6/6/72, 12/19/72 and 5/8/73)

APPENDIX B - EXCERPT FROM SUPPLEMENTAL BRIEF
AND APPENDIX FOR RESPONDENT - AVANT v. CLIFFORD

"RECAPITULATION

"Letters of inquiry were sent to 54 jurisdictions, including the Bureau of Prisons of the United States Department of Justice, the other 49 states, American Samoa, Guam, Puerto Rico and the Virgin Islands. Responses were received from 43 jurisdictions.*

"Replies from eighteen jurisdictions appear to indicate that some form of questioning by the inmate himself of the accusing officer of witnesses may be either permitted or required. Unfortunately, these jurisdictions did not all specifically answer the question whether cross-examination is permitted in "every" case, nor were they all able to isolate the effect of cross-examination per se inasmuch as it was frequently merely one component of a body of disciplinary hearing procedures recently adopted. Nevertheless, the following classifications seem appropriate and accurate since the replies received appear to fall into the seven broad categories indicated: (I) Where confrontation or cross-examination is not permitted or provided; (II) Where questions to a witness may be submitted only by a representative of the accused inmate, but not by the inmate himself; (III) Where questions to a witness may only be submitted to a witness through the Hearing Body Chairman; (IV) Where Cross-examination is discretionary, but not required; (V) Where cross-examination by an inmate is permitted according to whether the penalty is a "grievous" one, and wherein certain of the letter responses expressly defined such "grievous penalties"; (VI) Where cross-examination is permitted only if the inmate requests it; and (VII) Where it appears cross-examination is permitted in every case.

I

"Replies from the following nineteen jurisdictions appear to indicate confrontation and cross-examination are not permitted, or are not expressly provided for: (1) United States Bureau of Prisons; (2) Arkansas; (3) Colorado; (4) Connecticut; (5) Florida; (6) Georgia; (7) Maine**; (8) Michigan; (9) Mississippi; (10) Missouri; (11) Montana; (12) Nebraska; (13) New York; (14) Oklahoma; (15) Oregon; (16) Texas; (17) Utah; (18) West Virginia; and (19) American Samoa.

*The eleven jurisdictions which furnished no information were: Alabama, California, Guam, Indiana, Iowa, Kentucky, Pennsylvania, Puerto Rico, Virgin Islands, Wisconsin and Wyoming.

**Under Maine regulations, confrontation and cross-examination are only permitted in hearings on "offenses", i.e., acts constituting state or federal crimes. As to these hearings, Maine reports there is no present data on the impact of the rule, but that prison administrators have expressed concern about the substantial demands entailed upon staff time and manpower.

II

"Replies from five jurisdictions indicate that only an indirect form of cross-examination is utilized, by permitting questions to a witness to be submitted by a staff representative or counsel of the inmate, but not by the inmate himself: (1) Alaska; (2) Arizona; (3) New Mexico; (4) South Carolina; and (5) Tennessee.

"As to the experiences of these jurisdictions, it has been indicated as follows: (1) Alaska supplied no information on its experiences with its procedures, which are now 15 months old; (2) Arizona reported its rules are too new for it to supply reliable information on their effect; (3) New Mexico, whose procedure merely permits the questioning of a special impartial agent (who is not the inmate's accuser, but one who investigates the facts and interviews both sides), reports its system has worked well for all concerned; (4) South Carolina indicated it felt its procedure, despite its shortcomings, to be the most proper vehicle for disciplinary hearings; (5) Tennessee, which permits questioning by inmate counsel, who represent prisoners at such hearings on a full time basis, reports its experiences on the whole have been good.

III

"In one jurisdiction, Ohio, an inmate may only question his accuser by submitting his questions through the chairman of the hearing board. As to their experience, Ohio reports that although no statistics are available, the greatest problem this has caused is requiring a "great deal of paper work" and having the hearing on one of the accusing officer's regular working days.

IV

"Replies from three states indicated that cross-examination is discretionary by the Hearing Body: (1) In Idaho, it is permitted if material, but only when the accusing officer is present, and the Hearing Body has discretion as to when it shall be allowed; (2) In North Carolina, the committee may summon any witnesses and may permit the accused inmate to question them; (3) In Illinois, the inmate may ask the committee to interview witnesses for him, and if they have relevant information, they will be called to testify, in which event the inmate may question the witnesses, but there is no requirement that the accusing officer always appear, and a significant number of charges are disposed of based on the written records and the inmate's explanation, or on interviews of the accusing officer via telephone during the actual hearing itself.

"The experiences related by the above three states indicate that Idaho is unable to determine the effect of cross-examinati

North Carolina supplied no information on its experiences; and Illinois is unable to supply data on the effect on security, morale, or rehabilitation, although the disciplinary process has not been impeded by the new procedure and many employees are unhappy about the additional demands on their time and energies.

V

"Five states indicated that cross-examination is permitted only where the possible penalty is of a "grievous" nature and actually defined the requisite penalty or grievous loss: (1) In Delaware, only where the penalty may exceed five days confinement or the loss of five days' good time; (2) In Hawaii, where the "grievous loss" with which the prisoner is threatened is placement in solitary confinement for an indefinite period; (3) In Maryland, as to major violations, where the penalty may be confinement more than 15 days and/or loss of more than five days' good behavior time, and if it becomes inflammatory, the Hearing Officer may require cross-examination"through his position"; (4) In Nevada, as to "major infractions" where the penalty may be permanent loss of privileges, confinement in isolation cell, possible loss of good time credits, or referral to the District Attorney; (5) In South Dakota, where the penalty may be a sentence to the Adjustment Center or to the security and isolation area.

"As to the experiences of the above five states, it was indicated: (1) Delaware reports that under their new "Treatment Rules", of which disciplinary hearings are a part, no great change in discipline; as to security they have set aside a housing area for chronic agitators who cannot adjust; they cannot determine the effect on rehabilitation; there has been an increase in manpower hours and overtime; there is an improvement in the quality of the hearings; and there has been no effect on the reporting systems; (2) Hawaii is unable to evaluate the effects of the procedures at this time; (3) Maryland indicates it is difficult to evaluate the effects on discipline, security and rehabilitation; it may result in overtime work by the accusing officer; and the quality of the hearing depends on the control the hearing officer has over the hearing; (4) Nevada indicates no change in inmate attitudes or morale, and inmates still believe the hearings are unfair; no effect on security, inmate rehabilitation or inmate safety; the staff is more aware of procedural safeguards; and the cases have decreased to some extent; (5) South Dakota indicates positive effect on discipline; effects are unknown on security, order and prisoner rehabilitation; effects on fiscal budget and manpower hours are burdensome; no problems on the quality of the hearings; and fewer hearings are now held because guards reportedly do not want to be bothered with the hearing procedure.

VI

"Five states appear to indicate cross-examination by the inmate is permitted where the inmate requests same: (1) Louisiana; (2) Massachusetts; (3) Minnesota; (4) North Dakota; and (5) Rhode Island.

"The experience of these five jurisdictions indicate: (1) Louisiana: No effect on discipline, security or order; impossible to isolate the effect of cross-examination on rehabilitation or quality of the hearings, although their new procedures have improved the chances of rehabilitation and the quality of their hearings; little effect on man-hours or budget since the counsel substitutes, who are inmates, do not abuse the right; (2) Massachusetts: They cannot accurately assess the procedure's effect on inmate discipline, prison security, order, prisoner rehabilitation, or filing of reports; it has created certain inconveniences regarding manpower hours and administration, but not too burdensome; (3) Minnesota: There is greatly varied opinion, but it upgrades the quality of the hearings and relieves inmate frustration; having the officer available for the hearing is very expensive and complicates the hearing scheduling greatly; there has been some small effect on inmate discipline, security and rehabilitation; effects on manpower hours and budget has been "startling", as overtime, summoning of officers from off-duty hours, time spent at hearings and disruption of staff routine and record keeping have increased greatly; quality of hearing has been upgraded; no effect on inmate safety; (5) Rhode Island: No Information supplied.

VII

"Replies from five states appear to indicate that cross-examination is permitted in every case: (1) Kansas; (2) New Hampshire; (3) Vermont; (4) Virginia; and (5) Washington.

"The experience of these jurisdictions indicate as follows: (1) Kansas: Beneficial effect on inmate discipline and quality of the hearings; effect on inmate rehabilitation unknown; some effect on budget and administration; very little effect on reporting system. (2) New Hampshire: After only nine months their experience cannot be meaningfully stated. However, due to starting-up difficulties, which slowed down the disciplinary process and consumed an inordinate amount of time of officers and delayed the imposition of discipline, it is felt these procedures had an adverse effect on discipline, security and order and the efficiency of the prison's administration; (3) Vermont: No apparent effect on discipline and security; the effects on inmate rehabilitation which they hoped for, have not been very successful, and regardless of procedures used, inmates are dissatisfied, increase in manpower hours by new disciplinary regulations, but difficult to determine effect on budget of cross-examination alone; cross-examination was supposed to increase

the quality of the hearings, but they are not sure this has been the case; reporting of cases has decreased to a degree; (4) Virginia: Hearings have caused a favorable result on inmate discipline, although at first discipline and security decreased because of officials' resistence; (5) Washington: Effect on discipline at this point is hard to define but most feel the procedures are more fair, but perhaps unduly technical; the rules will require substantially more money and manpower to properly implement; in general, the quality of the hearings has improved.

CONCLUSION

"It appears from the foregoing materials that a number of jurisdictions have adopted procedures permitting some form of cross-examination by inmates, in at least some disciplinary hearings, without having suffered significant adverse consequences in the operation of the correctional institutions, but these procedures have, for the most past, been adopted quite recently, and, therefore, the currently available data is inconclusive with respect to the consequence of such procedures."

APPENDIX C - ARTICLES DEALING WITH PRISON DISCIPLINARY ADMINISTRATION

This Appendix is excerpted from a comprehensive general bibliography of cases and articles which has been published as a special edition of the Prison Law Reporter.

Articles

Brant, Prison Disciplinary Procedures: Creating Rules, 21 Clev. St. L. Rev. 83 (1972)

Clements and Ferguson, Judicial Responsibility for Prisoners: The Process That is Due, 4 Creighton L. Rev. 47 (1971).

Gallington, Prison Disciplinary Decisions, 60 J. Crim. L., C. & P.S. 152 (1969).

Hollander, The "Adjustment Center": California's Prison within A Prison, 1 Black L. J. 152 (1971)

Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 227 (1970).

Kraft, Prison Disciplinary Practices and Procedures: Is Due Process Provided?, 47 N.D.L. Rev. 9 (1970).

Millemann, Due Process Behind the Walls, Prisoners' Rights Sourcebook 79 (1973)

Millemann, Prison Disciplinary Hearings and Procedural Due Process: The Requirements of a Full Administrative Hearing, 31 Md. L. Rev. 27 (1971).

Newman, The Process of Prescribing Due Process, 49 Calif. L. Rev 215 (1961)

Schwartz, Lolleeny, Campana, Harvey, Due Process in Prison Disciplinary Hearings, 29 Guild Prac. 79 (1972)

Schwartz, A Comment on Sostre v. McGinnis, 21 Buff. L. Rev. 775 (1972).

Sirrico, Prisoner Classification and Administrative Decision Making 50 Tex. L. Rev. (1972)

Turner & Daniel, Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime, 21 Buff. L. Rev. 759 (1972).

Vanderet, Procedural Due Process in California Prisons. 48 Cal. Bar. D. 668 (1973).

Warren, Classification of Offenders as an Aid to Efficient Management and Effective Treatment, 62 J. Crim. L., C. & P.S. 239 (1971).

Wick, Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements, 18 S.D.L. Rev. 309 (1973).

Law Review Comments, Notes, Etc.

Note, Procedural Due Process for Intraprison Disciplinary Hearings: An Arkansas Analysis, 27 Ark. L. Rev. 44 (1973).

Note, Judicial Limitations Upon Disciplinary Authority in the Penal Process, 8 Calif. Western L. Rev. 505 (1972).

Punitive Segregation in State Prisons-The Need for Definite Time Limitation. 76 Dick 1. Rev. 125 (1971).

Note, Judicial Intervention in Prison Discipline, 63 J. Crim. L. C. & P. S. 200 (1972).

Note, Administrative Decisions in Prisons: Are Prisoners Entitled to Procedural Due Process 2 Memp. S. L. Rev. 85 (1971).

Note, Due Process Safeguards in Prison Disciplinary Proceedings: The Application of The Goldberg Balancing Test, 49 N.D. L. Rev. 675 (1973).

Note, Civil Rights: Procedural Due Process in Prison Disciplinary Hearings, 26 Okla. L. Rev. 261 (1973).

Note, Prisons---Right to Counsel After Riot, 6 Suff. U.L. Rev. 1189 (1972).

Note, Prisons---Procedural Due Process and Prison Administration 6 Suff. U.L. Rev. 1169 (1972).

Note, Right to Counsel at Prison Disciplinary Hearings, 2 U. Balt. L. Rev. 263 (1973).

Note, Due Process in California Prison Disciplinary Hearings, 5 U.C.D. L. Rev. 384 (1972).

Note, Procedural Due Process in a Prison Disciplinary Proceeding, U. Pa. L. Rev. 844 (1973).

Note, Intra-Penal Disciplinary Proceedings, 1971 U. Tol. L. Rev. 618

Note, Scope of Fourteenth Amendment Due Process: Counsel in Prison Disciplinary Proceedings, 1971 Utah L. Rev. 275

Note, Constitutional Law - Due Process Clause of the Fourteenth Amendment May Require Elementary Procedural Safeguards for Prisoners in Administration of Prison Discipline, 25 Vand. L. Rev. 1079 (1972).

Note, Constitutional Law-Enforcement of Prison Discipline and its Effect Upon the Constitutional Rights of Those Imprisoned, 8 Vill. L. Rev. 379 (1963).

Note, Federal Court Intervention in State Prison Internal Disciplinary Hearings to Guarantee Fourteenth Amendment Procedural Due Process, 17 Wayne L. Rev. 931 (1971).

Note, Administrative Fairness in Corrections, 1969 Wis. L. Rev. 587.

APPENDIX B

SUPREME COURT OF NEW JERSEY

DOCKET NO. 22-73

THOMAS X. AVANT, *et als.*, *Appellants*, v. ROBERT L. CLIFFORD, Commissioner of the New Jersey Department of Institutions and Agencies, *et als.*, *Respondents.*	Civil Action On Appeal to Review Validity of Rules and Regulations of the Department of Institutions and Agencies Regulating the Conduct Privileges and Duties of Inmates in the Correctional System.

SUPPLEMENTAL BRIEF AND APPENDIX FOR RESPONDENTS

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Deputy Attorney General
On the Brief

Filed: February 5, 1974

52. WISCONSIN–No Reply.
53. WYOMING–No Reply.

RECAPITULATION

Letters of inquiry were sent to 54 jurisdictions, including the Bureau of Prisons of the United States Department of Justice, and other 49 states, American Samoa, Guam, Puerto Rico and the Virgin Islands. Responses were received from 43 jurisdictions.*

Replies from eighteen jurisdictions appear to indicate that some form of questioning by the inmate himself of the accusing officer or witnesses may be either permitted or required. Unfortunately, these jurisdictions did not all specifically answer the question whether cross-examination is permitted in "every" case, nor were they all able to isolate the effect of cross-examination per se inasmuch as it was frequently merely one component of a body of disciplinary hearing procedures recently adopted. Nevertheless, the following classifications seem appropri-

*The eleven jurisdictions which furnished no information were: Alabama, California, Guam, Indiana, Iowa, Kentucky, Pennsylvania, Puerto Rico, Virgin Islands, Wisconsin and Wyoming.

ate and accurate since the replies received appear to fall into the seven broad categories indicated: (I) Where confrontation or cross-examination is not permitted or provided; (II) Where questions to a witness may be submitted only by a representative of the accused inmate, but not by the inmate himself; (III) Where questions to a witness may only be submitted to a witness through the Hearing Body Chairman; (IV) Where cross-examination is discretionary, but not required; (V) Where cross-examination by an inmate is permitted according to whether the penalty is a "grievous" one, and wherein certain of the letter responses expressly defined such "grievous penalties"; (VI) Where cross-examination is permitted only if the inmate requests it; and (VII) Where it appears cross-examination is permitted in every case.

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**Under Maine regulations, confrontation and cross-examination are only permitted in hearings on "offenses", i.e., acts constituting state of federal crimes. As to these hearings, Maine reports there is no present data on the impact of the rule, but that prison administrators have expressed concern about the substantial demands entailed upon staff time and manpower.

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Replies from five jurisdictions indicate that only an indirect form of cross-examination is utilized, by permitting questions to a witness to be submitted by a staff representative or counsel of the inmate, but not by the inmate himself: (1) Alaska; (2) Arizona; (3) New Mexico; (4) South Carolina; and (5) Tennessee.

As to the experiences of these jurisdictions, it has been indicated as follows: (1) Alaska supplied no information on its experiences with its procedures, which are now 15 months old; (2) Arizona reported its rules are too new for it to supply reliable information on their effect; (3) New Mexico, whose procedure merely permits the questioning of a special impartial agent (who is not the inmate's accuser, but one who investigates the facts and interviews both sides), reports its system has worked well for all concerned; (4) South Carolina indicated it felt its procedure, despite its shortcomings, to be the most proper vehicle for disciplinary hearings; (5) Tennessee, which permits questioning by inmate counsel, who represent prisoners at such hearings on a full time basis, reports its experiences on the whole have been good.

III

In one jurisdiction, Ohio, an inmate may only question his accuser by submitting his questions through the chairman of the hearing board. As to their experiences, Ohio reports that although no statistics are available, the greatest problem this has caused is requiring a "great deal of paper work" and having the hearing on one of the accusing officer's regular working days.

IV

Replies from three states indicated that cross-examination is discretionary by the Hearing Body: (1) In Idaho, it

is permitted if material but only when the accusing officer is present, and the Hearing Body has discretion as to when it shall be allowed; (2) In North Carolina, the Committee may summon any witnesses and may permit the accused inmate to question them; (3) In Illinois, the inmate may ask the committee to interview witnesses for him, and if they have relevant information, they will be called to testify, in which event the inmate may question the witnesses, but there is no requirement that the accusing officer always appear, and a significant number of charges are disposed of based on the written records and the inmate's explanation, or on interviews of the accusing officer via telephone during the actual hearing itself.

The experiences related by the above three states indicate that Idaho is unable to determine the effect of cross-examination; North Carolina supplied no information on its experiences; and Illinois is unable to supply data on the effect on security, morale, or rehabilitation, although the disciplinary process has not been impeded by the new procedure and many employees are unhappy about the additional demands on their time and energies.

V

Five states indicated that cross-examination is permitted only where the possible penalty is of a "grievous" nature and actually defined the requisite penalty or grievous loss: (1) In *Delaware*, only where the penalty may exceed five days confinement or the loss of five days' good time; (2) In *Hawaii*, where the "grievous loss" with which the prisoner is threatened is placement in solitary the Committee may summon any witnesses and may permit the accused inmate to question them; (3) In Illinois, the inmate may ask the committee to interview witnesses for him, and if they have relevant information,

they will be called to testify, in which event the inmate may question the witnesses, but there is no requirement that the accusing officer always appear, and a significant number of charges are disposed of based on the written records and the inmate's explanation, or on interviews of the accusing officer via telephone during the actual hearing itself.

The experiences related by the above three states indicate that Idaho is unable to determine the effect of cross-examination; North Carolina supplied no information on its experiences; and Illinois is unable to supply data on the effect on security, morale, or rehabilitation, although the disciplinary process has not been impeded by the new procedure and many employees are unhappy about the additional demands on their time and energies.

V

Five states indicated that cross-examination is permitted only where the possible penalty is of a "grievous" nature and actually defined the requisite penalty or grievous loss: (1) In *Delaware*, only where the penalty may exceed five days confinement or the loss of five days' good time; (2) In *Hawaii*, where the "grievous loss" with which the prisoner is threatened is placement in solitary confinement for an indefinite period; (3) In *Maryland*, as to major violations, where the penalty may be confinement more than 15 days and/or loss of more than five days good behavior time, and if it becomes inflammatory, the Hearing Officer may require cross-examination "through his position", (4) In *Nevada*, as to "major infractions" where the penalty may be permanent loss of privileges, confinement is isolation cell, possible loss of good time credits, or referral to the District Attorney; (5) In *South Dakota*, where the penalty may

be a sentence to the Adjustment Center or to the security and isolation area.

As to the experiences of the above five states, it was indicated: (1) *Delaware* reports that under their new "Treatment Rules", of which disciplinary hearings are a part, no great change in discipline; as to security they have set aside a housing area for chronic agitators who cannot adjust; they cannot determine the effect on rehabilitation; there has been an increase in manpower hours and overtime; there is an improvement in the quality of the hearings; and there has been no effect on the reporting systems; (2) *Hawaii* is unable to evaluate the effects of the procedures at this time; (3) *Maryland* indicates it is difficult to evaluate the effects on discipline, security and rehabilitation; it may result in overtime work by the accusing officer; and the quality of the hearings depends on the control the hearing officer has over the hearing; (4) *Nevada* indicates no change in inmate attitudes or morale, and inmates still believe the hearings are unfair; no effect on security, inmate rehabilitation or inmate safety; the staff is more aware of procedural safeguards; and the cases have decreased to some extent; (5) *South Dakota* indicates positive effect on discipline; effects are unknown on security, order and prisoner rehabilitation; effects on fiscal budget and manpower hours are burdensome; no problems on the quality of the hearings; and fewer hearings are now held because guards reportedly do not want to be bothered with the hearing procedure.

VI

Five states appear to indicate cross-examination by the inmate is permitted where the inmate requests same: (1) Louisiana; (2) Massachusetts; (3) Minnesota; (4) North Dakota; and (5) Rhode Island.

The experiences of these five jurisdictions indicate: (1) *Louisiana:* No effect on discipline, security or order; impossible to isolate the effect of cross-examination on rehabilitation or quality of the hearings, although their new procedures have improved the chances of rehabilitation and the quality of their hearings; little effect on man-hours or budget since the counsel substitutes, who are inmates, do not abuse the right; (2) *Massachusetts:* They cannot accurately assess the procedure's effect on inmate discipline, prison security, order, prisoner rehabilitation, or filing of reports; it has created certain inconveniences regarding manpower hours and administration, but not too burdensome; (3) *Minnesota:* There is greatly varied opinion, but it upgrades the quality of the hearings and relieves inmate frustration; having the officer available for the hearing is very expensive and complicates the hearing scheduling greatly; there has been some small effect on reporting practices; (4) *North Dakota:* Good effect on inmate discipline, security and rehabilitation; effects on manpower hours and budget has been "startling", as overtime, summoning of officers from off-duty hours, time spent at hearings and disruption of staff routine and record keeping have increased greatly; quality of hearing has been upgraded; no effect on inmate safety; (5) *Rhode Island:* No information supplied.

VII

Replies from five states appear to indicate that cross-examination is permitted in every case: (1) Kansas; (2) New Hampshire; (3) Vermont; (4) Virginia, and (5) Washington.

The experiences of these jurisdictions indicate as follows: (1) *Kansas*: Beneficial effect on inmate discipline and quality of the hearings; effect on inmate rehabilita-

tion unknown; some effect on budget and administration; very little effect on reporting system. (2) *New Hampshire:* After only nine months their experiences cannot be meaningfully stated. However, due to starting-up difficulties, which slowed down the disciplinary process and consumed an inordinate amount of time of officers and delayed the imposition of discipline, it is felt these procedures had an adverse effect on discipline, security and order and the efficiency of the prison's administration; (3) *Vermont*: No apparent effect on discipline and security; the effects on inmate rehabilitation which they hoped for, have not been very successful, and regardless of procedures used, inmates are dissatisfied, increase in manpower hours by new disciplinary regulations, but difficult to determine effect on budget of cross-examination alone; cross-examination was supposed to increase the qualtiy [sic] of the hearings, but they are not sure this has been the case; reporting of cases has decreased to a degree; (4) *Virginia*: Hearings have caused a favorable result on inmate discipline, although at first discipline and security decreased because of officials' resistence; (5) *Washington*: Effect on discipline at this point is hard to define but most feel the procedures are more fair, but perhaps unduly technical; the rules will require substantially more money and manpower to properly implement; in general, the quality of the hearings has improved.

CONCLUSION

It appears from the foregoing materials that a number of jurisdictions have adopted procedures permitting some form of cross-examination by inmates, in at least some disciplinary hearings, without having suffered significant adverse consequences in the operation of the correctional institutions, but these procedures have, for the most part, been adopted quite recently, and, therefore, the currently available data is inconclusive with respect to the consequences of such procedures.

Respectfully submitted,

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APPENDIX C

ADMINISTRATIVE SEGREGATION

IN

CALIFORNIA'S PRISONS

Alias: The Hole, Lockup, Solitary Confinement
And the Adjustment Center

Report of:

The Assembly Select Committee on
Prison Reform and Rehabilitation

Chairman
Assemblyman Walter Karabian

September 1973

ADMINISTRATIVE SEGREGATION IN CALIFORNIA'S PRISONS ALIAS: THE HOLE, LOCKUP, SOLITARY CONFINEMENT AND THE ADJUSTMENT CENTER

The first adjustment center established by the California Department of Corrections was completed at Folsom State Prison in 1952. This unit was occupied on February 2, 1953. Since the inception of this first adjustment center, the utilization of such units in California's prison system has been the subject of strong criticism by convicts, concerned citizens, and correctional staff.

The development and use of adjustment centers was based on the need to separate those convicts who sought to disrupt or destroy the institution from those convicts who were trying to prepare themselves for the future. Therefore, the adjustment center because a prison within a prison: a maximum physical control unit, segregated from the rest of the institution.

However, the need for segregation of some convicts was not the sole purpose of the adjustment center. As stated in the Rules of the Director of the Department of Corrections, there were two goals of the adjustment centers:

> . . . first, to maintain the security of the institution by removing inmates who cannot function in the general population; second, to discover and effect adequate methods of treatment whereby these inmates can be ultimately restored to the general population, and hence to society.[1]

The treatment aspect of the adjustment center was envisioned by the Department of Corrections as a

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[1] *Director's Rules,* California Department of Corrections, Chapter V, CL/83, February 5, 1970.

far-reaching contribution to penology. In order to successfully treat and prepare those individuals who were housed in an adjustment center for their eventual return to the general population, this program was to provide:

a) A positive, treatment-oriented atmosphere wherein the individual inmate can come to grips with his personality problems.

b) An optimum amount of individual and group counseling, individual and group psychotherapy, both in scheduled sessions and in informal counseling by staff of the Adjustment Center.

c) Professional treatment time should be provided directly to the inmate and in consultive services to the staff. Adjustment Centers should have specialized psychiatric, psychological and social work services.[2]

These conditions were never realized. The Department of Corrections not only stumbled in achieving their objective, but fell flat on their face. The adjustment centers have been recognized for what they are. As stated by Dr. David A. Ward,[3]

> Segregation and isolation units (the 'hole') were merely relabeled 'adjustment centers' with tempo-

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[2] *Director's Rules*, op. cit.

[3] David A. Ward is chairman of the Department of Criminal Justice Studies and professor of sociology at the University of Minnesota. Previously he was assistant director of the California Study of Correctional Effectiveness of the University of California at Los Angeles; he was also consultant to the National Commission on the Causes and Prevention of Violence. With Gene G. Kassebaum and Daniel M. Wilner, Dr. Ward is the author of Prison Treatment and Parole Survival.

rary and long-term residents classified into 'acute' and 'chronic' cases by 'adjustment committees.'[4]

In sipite of the dismal failure of the Department to achieve the goals of the adjustment centers, these lock-up units did isolate violent or violence-prone convicts. Therefore, under the pretence of contributing new methods of penology, additional adjustment centers were constructed. A second unit was opened in July 1953 at the Deuel Vocational Institution near Tracy. In the following years adjustment centers were established at San Quentin State Prison; California Institution for Men, Chino; and at the Correctional Training Facility, Soledad.

Long before the establishment of the adjustment centers, there were units set aside for administrative segregation. These lock-up units attempt

> . . . to provide external controls for those individuals unable to control their own behavior in the general population but are not considered amenable to Adjustment Center programming.[5]

While administrative segregation is designed to remove from the general population, assaultive, aggressive, and predatory convicts, this form of lock-up does not even purport to provide treatment. While the Department of Corrections states that segregation is not intended as a punitive measure,[6] it is difficult to perceive twenty-three hours of lock-up per day in any other terms.

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[4] *Prisoners in America*, edited by Lloyd E. Ohlin (Prentice-Hall, Inc., Englewood Cliffs, N.J., 1973) pg. 187.

[5] *Director's Rules*, op. cit.

[6] Stated in a letter to Assemblyman Walter Karabian, Chairman, Select Committee on Prison Reform and Rehabilitation, from Mr. Raymond K. Procunier, Director, California Department of Corrections, September 14, 1972.

Recognizing the failure of the adjustment centers as a means of returning men who were management problems to the general population, two programs evolved which attempted to fulfill that goal. The adjustment center at the California Institution for Men, Chino, which was opened in September, 1969, became "the first major specialized effort to get long-time adjustment center cases back into the general population."[7]

This program, though apparently quite successful and well received by both the inmates and correctional staff, has been drastically cut back. It now occupies only about one-half the physical plant that it did in 1969.

A second program, called the Maximum Psychiatric Diagnostic Unit, was established at the California Medical Facility, Vacaville in February, 1972. This program was to evaluate long-term lock-up cases for possible mainline placement. However, this unit is currently in danger of developing into another long-term lock-up unit.

Given the need for a unit which can separate violent, assaultive, disruptive men from the general population, the Department of Corrections has developed a system which not only segregates these men, but oppresses and represses them as well. While the Department of Corrections must concern itself with security and the safety of others, it cannot ignore the human needs of the individuals in lockup. Significantly, as noted by the Ohio Citizen's Task Force on Corrections,

> "Treatment-oriented personnel at all levels express concern about the conflict between security and program needs. While we recognize that institutional rules and regulations play a vital role in the correctional process, unnecessary rules, regimenting

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[7] *Ibid.*

minor aspects of daily life, impede the development of individual responsibility. . . . the basic principles of human dignity need to be observed."[8]

I.

SUMMARY OF RECOMMENDATIONS

Recommendation No. 1—Closure of 1-C and B-Section

The Selection Committee on Prison Reform and Rehabilitation recommends that the utilization of 1-C at Folsom State Prison and B-Section at San Quentin State Prison be terminated immediately. Prison officials concurred with this Committee that both of these facilities were inadequate for the decent housing of inmates. Neither unit should ever be used again. New housing units should be constructed immediately to replace these facilities.

Recommendation No. 2—Disciplinary Hearings

Existing procedures to safeguard the prisoners' rights in disciplinary hearings are frequently not followed. In spite of the American Justice system, convicts are often presumed to be guilty, when suspected of new crimes. Therefore, hearings are concerned primarily with punishment rather than determining guilt. The arbitrary, unchecked, and overwhelming power of the Disciplinary and Classification Committees is smothering the right of the prisoner to due process. This Committee urges that the Department of Corrections take corrective action immediately to ensure that the convict is fairly repre-

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[8] *Final Report*, Ohio Citizens' Task Force on Corrections, Columbus, Ohio, 1971, pages C38, C39.

sented before the Disciplinary and Classification Committees. We further recommend that the practice of punishing men, where their guilt has not been proven, be terminated at once.